(26,923)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 837.

ASH SHEEP COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 24, 1919.

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No.....

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant and Plaintiff in Error.

Transcript of Record

Upon Appeal from the United States District Court for the District of Montana.

STATE PUBLISHING CO., HELENA, MONT.

Names and Addresses of Attorneys of Record

BURTON K. WHEELER, United States Attorney,
JAMES H. BALDWIN, Assistant U. S. Attorney,
Butte, Montana.
HOMER G. MURPHY, Assistant U. S. Attorney,
Helena, Montana.
Attorneys for Plaintiff and Defendant in Error.
C. B. NOLAN and WILLIAM SCALLON, Helena,
Montana.
Attorneys for Defendant and Plaintiff in Error.

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant.

No. 506

BE IT REMEMBERED, that on the 3rd day of May, 1916, the United States of America filed its complaint herein, which said complaint is in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant.

Complaint

The plaintiff complains of the defendant and for cause of action alleges:

I.

That the said defendant, Ash Sheep Company, now is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Billings, Montana, and as such corporation has been and now is engaged in the buying and selling of sheep and other livestock in the state and district of Montana, and in carrying on and conducting all such business and operations as are necessarily incident to and connected with the buying and selling sheep and other livestock in the state and district of Montana.

II.

That on or about the 12th day of August, 1868, the plaintiff and the Crow tribe of Indians entered into, concluded and there was promulgated a treaty by which the United States of America set aside for the occupancy, use and benefit of said Crow tribe of Indians certain lands included within the boundaries of that certain reservation within the state and district of Montana which has since been and is now known and designated as the Crow Indian Reservation.

III.

That during all of the times hereinafter mentioned the plaintiff was and now is the owner of

and entitled to the possession of all those certain tracts of land situate, lying and being within the original boundaries of the Crow Indian Reservation, and a part thereof, in the state and district of Montana, and described as follows, to-wit: Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east, Montana principal meridian.

IV.

That the lands hereinbefore described are a part of the lands included within the boundaries of the said Crow Indian Reservation opened to settlement and entry by the Act of the Congress of the United States entitled "An Act to ratify and amend an agreement with the Indians of Crow Indian Reservation, in Montana, and making appropriation to cary the same into effect," approved April 27th, 1904, (33 Stat. L. 352), and that said lands, and all thereof, were at all of the times hereinafter mentioned, vacant lands upon which no settlements, entries or allotments of any kind had been made, and that the Indian title to the same had not been extinguished.

V.

That on or about the 14th day of July, 1913, the exact date thereof being now unknown to plaintiff and for that reason not more definitely alleged, the defendant, Ash Sheep Company, in

violation of the provisions of section 2117 of the Revised Statutes of the United States, and without the consent or permission of the Crow tribe of Indians, or of the United States, drove, ranged, fed and grazed, and caused to be driven, ranged, fed and grazed upon the tracts of land hereinbefore described, and upon other vacant lands included within the boundaries of said Crow Indian Reservation and opened to settlement and entry by the aforesaid Act of April 27th, 1904, a more particular description of said lands being at this time to plaintiff unknown, a large number of sheep, to-wit, about seven thousand one hundred (7,100) head, and which seven thousand one hundred (7,100) head of sheep were thereafter, for a long period of time, by the said defendant, Ash Sheep Company, ranged, fed and grazed upon said lands.

VI.

That under the provisions of section 2117 Revised Statutes of the United States the plaintiff is entitled to recover from the said defendant Ash Sheep Company, for the use and benefit of said Crow tribe of Indians, a penalty of one dollar for each of said seven thousand one hundred (7,100) head of sheep, so driven, ranged, fed and grazed upon the said lands by said defendant, Ash Sheep Company, as hereinbefore set forth, and amounting in all to the sum of seven thousand one hundred dollars ($7,100).

WHEREFORE, plaintiff prays judgment against said defendant Ash Sheep Company for

the sum of seven thousand one hundred dollars ($7,100), as a penalty as hereinbefore set forth, and for costs of suit herein expended.

B. K. WHEELER,
United States Attorney District of Montana.
HOMER G. MURPHY,
FRANK WOODY,
Assistant U. S. Attorney District of Montana.

United States of America,
District of Montana,—ss.

Frank Woody, being first duly sworn according to law, deposes and says, that he is a duly appointed, qualified and acting Assistant United States Attorney for the district of Montana; that he has read the foregoing complaint and knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

FRANK WOODY.

Subscribed and sworn to before me this 3rd day of May, 1916.

GEO. W. SPROULE,
Clerk U. S. District Court, District of Montana.
By HARRY H. WALKER,
Deputy.

[Indorsed]: Title of Court and Cause. Complaint. Filed May 3, 1916. Geo. W. Sproule, Clerk, by Harry H. Walker, Deputy.

And thereafter, to-wit, on the 3rd day of May, 1916, summons was duly issued herein, and thereafter duly served upon the defendant, said sum-

mons and return thereon being in the words and figures following, to-wit:

UNITED STATES OF AMERICA.

District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Action brought in the said District Court and the complaint filed in the office of the Clerk of said District Court in the City of Helena, County of Lewis and Clark.

The President of the United States of America, Greeting: To the Above Named Defendant, Ash Sheep Company, a Corporation.

You are hereby summoned to answer the complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the United States District Court, District of Montana this 3rd day of May in the year of our Lord one thousand nine hundred and 16 and of

our Independence the 140.

[Seal] GEO. W. SPROULE,
Clerk.
By HARRY H. WALKER,
Deputy Clerk.

United States Marshal's Office,
District of Montana.

I HEREBY CERTIFY, that I received the within summons on the 4th day of May, 1916, and personally served the same on the 5th day of May, 1916, on the Ash Sheep Company by delivery to, and leaving with Christian Yegen, President of said defendants named therein personally, at Billings, County of Yellowstone, in said district, a certified copy thereof, together with a copy of the Complaint, certified to by Geo. W. Sproule attached thereto.

Dated this 6th day of May, 1916.

JOS. L. ASBRIDGE,
U. S. Marshal.
By A. G. SATHRE,
Deputy.

[Indorsed]: Title of Court and Cause. Summons. B. K. Wheeler, U. S. Atty., Butte, Montana, Plaintiff's Attorney. Filed May 6th, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to-wit, on May 25th, 1916, defendant served and filed its demurrer to said com-

plaint herein, which is in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Demurrer

Now comes the defendant and demurs to the plaintiff's complaint, and for cause of demurrer says, that said complaint does not state facts sufficient to constitute a cause of action.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Demurrer. Filed May 25, 1916. Geo. W. Sproule, Clerk.

And thereafter, to-wit, on June 15th, 1916, the court made and entered herein its order in words and figures following, to-wit:

In the District Court of the United States in and for the District of Montana.

No. 506.

UNITED STATES vs. ASH SHEEP CO.

On motion of C. B. Nolan, Esq., it is ordered that defendant may withdraw its demurrer herein and file an answer. Thereupon answer was filed.

Entered in open court June 15, 1916.

GEO. W. SPROULE, Clerk.

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Answer

Now comes the defendant above named, and for answer to plaintiff's complaint, admits, alleges and denies as follows:

I.

Admits the allegations of paragraph I., except that it denies that it is now engaged in the business alleged, or in any business whatsoever.

II.

Admits the allegations of paragraphs II., III., and IV., except that as to the allegations of paragraph IV., that the Indian title to the lands had not been extinguished, and as to that allegation, defendant has no knowledge or information sufficient to form a belief and denies the same.

III.

Denies the allegations of paragraph V., except as hereinafter qualified.

IV.

Denies the allegtaions of paragraph VI.

FURTHER ANSWERING SAID COMPLAINT, DEFENDANT ALLEGES:

I.

That at the time stated in plaintiff's complaint, the defendant, Ash Sheep Company, was engaged in the sheep business, and at said time owned and ran several bands of sheep, and at the time stated owned approximately the number of head of sheep stated in plaintiff's complaint, and that the sheep so owned by it were in separate bands, and were run and handled by sheep herders in its employ.

II.

That the lands mentioned in paragraphs III. and V. of plaintiff's complaint were originally within the Crow Indian Reservation and were lands to which the Act of Congress, mentioned in paragraph IV. of plaintiff's complaint applied.

III.

That pursuant to the said Act of Congress, to which reference is made in plaintiff's complaint, and pursuant to the proclamation of the President of the United States made and issued in conformity with said Act of Congress, certain of the lands so ceded and affected by said Act of Congress and by said proclamation were settled on by settlers, and title thereto acquired by said settlers, and that the settlements so made were promiscuously scattered over the entire tract of land so ceded as aforesaid, and that such lands so settled on were in the private ownership of said settlers, or their grantees at the time mentioned in plaintiff's complaint.

IV.

That on the 14th day of July, 1913, and for a long time prior thereto and subsequent thereto, this answering defendant owned in said ceded strip, large tracts of land, of the title to which, the United States had been divested, and, likewise, at said time was entitled to the use of large tracts of land in said ceded strip as lessee from those to whom title had passed from the United States, pursuant to law, providing for the settlement on said strip, and the disposal of same, and that the said lands so owned and leased by it consisted of several thousand acres in separate tracts and bodies, and the said lands so owned and leased by it were in close proximity to the lands mentioned in paragraphs III. and V. of plaintiff's complaint, and on said lands so owned and leased by it, it herded and grazed some of the sheep owned by it.

V.

Defendant further avers that in getting its sheep onto those lands so leased and owned by it and onto its said holdings, between three and four thousand head of its sheep were driven across the lands described in plaintiff's complaint for the purpose of being taken to the lands owned and leased by it, as aforesaid, and in being thus driven, the said sheep grazed upon the lands mentioned in plaintiff's complaint, and in that connection, defendant alleges that the lands mentioned in plaintiff's complaint were so situate with reference to the lands owned and leased by it, as afore-

said, it would be impossible for the defendant to use its said lands, and it would be impossible for it to herd its sheep on its own holdings, as aforesaid, without such sheep being driven to and across some of the lands mentioned in plaintiff's complaint.

AND FOR A FURTHER DEFENSE TO PLAINTIFF'S COMPLAINT, DEFENDANT ALLEGES:

I.

That on the 11th day of August, 1913, the plaintiff filed its complaint in the above entitled court against the defendant, copy of which complaint is hereto attached, marked Exhibit "A," and made a part hereof;

II.

That on the 25th day of August, 1913, the defendant filed its Answer to said complaint, copy of which Answer is hereto attached, marked exhibit "B" and made a part hereof.

III.

That the relief prayed for by said plaintiff in said action is the same relief that is prayed for in the present action; that the wrong complained of in said action is the wrong complained of in the present action; that the damage item of seventy-one hundred dollars ($7100.00), sought to be recovered in said action is the penalty which plaintiff is now seeking to enforce in the present action.

IV.

Defendant further avers that issue was joined in said action, and such proceedings were there-

after had therein that said cause came on for trial in the above entitled court, and the said cause was tried in said court upon the 17th day of December, 1913, to the judge of said court without a jury, and it was considered by said court in said action as to whether or not the plaintiff was entitled to recover the penalty which it is now seeking to recover in the present action; that the said cause was submitted to said court for the determination, and in said cause conclusions of law were made by said court, a copy of which conclusions of law is hereto attached marked Exhibit "C" and made a part of this answer.

V.

That thereafter, on, to-wit, the 10th day of Febuary, 1916, a judgment and decree was duly made and entered in said action, copy of which said judgment and decree is hereto attached, marked Exhibit "D" and made a part hereof.

VI.

That said judgment still remains in full force and effect and stands unappealed from.

VII.

Defendant further alleges that plaintiff having instituted said action, and having sought to recover damages in said action, it elected to secure the relief which it was entitled to on account of the trespass complained of, which is the trespass complained of in the present action, and having so elected to recover the damages which is sought to recover in said action, and having recovered

damages for said trespass in said action, it ought now to be estopped from maintaining the present action.

WHEREFORE, defendant prays for judgment in its favor and for the dismissal of the complaint herein, and for costs of suit.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant.

State of Montana,
County of Lewis and Clark,—ss.

C. B. Nolan being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the defendant named in the foregoing entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief;

That affiant makes this affidavit and verification for and on behalf of said defendant, for the reason that said defendant is a corporation, and none of the officers of said defendant are within the County of Lewis and Clark, State of Montana, where affiant now is and resides and where this affidavit is made. C. B. NOLAN.

Subscribed and sworn to before me this 3rd day of June, 1916.

[Notary Seal] J. R. WINE, Jr.,
Notary Public for the State of Montana; Residing at Helena, Montana. My Commission Expires Nov. 17, 1917.

EXHIBIT "A."

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Bill of Complaint

To the Judge of the District Court of the United States, District of Montana:

The United States of America, by James W. Freeman, United States Attorney for the District of Montana, under authority and by the direction of the Attorney General, brings this bill of complaint against the Ash Sheep Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, and by reason thereof a citizen and resident of said State and District of Montana; and thereupon shows unto your Honor:

1. That the said defendant, the Ash Sheep Company, at all the times hereinafter mentioned, has been and now is a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at Billings, Montana, and as such corporation has been and now is engaged in the buying and selling of sheep and other livestock in the State and District of Montana, and carrying on and conducting all such business and operations as are

necessarily incident to the buying and selling of sheep in the State and District of Montana.

2. That on or about the 12th day of August, 1868, this complainant and the Crow tribe of Indians entered into, concluded and then and there was promulgated a treaty by which the United States of America set aside for the use and benefit of the said Crow tribe of Indians that certain reservation within the State and District of Montana, which has since been and now is known as the Crow Indian Reservation.

3. That during all of the times hereinafter mentioned this complainant was and now is the owner and lawfully entitled to the possession of all those certain tracts of land situate, lying and being within the original boundaries of the Crow Indian Reservation and a part thereof, in the State and District of Montana, and described as follows: Section twenty-seven (27), township two (2) north, range thirty-six (36) east; section twelve (12), township one (1) north, range thirty-six (36) east; sections six (6) and seven (7), township four (4) north, range thirty-six (36) east of Montana principal meridian. That all of said lands are reserved lands and a part of the lands reserved and set aside by the said United States for the use and benefit of the said tribe of Crow Indians, in said State and District of Montana.

4. That the lands hereinabove described are a part of the vacant ceded Indian lands of the said Crow tribe of Indians and that the Indian title to

the same has not been extinguished and that said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior of the United States concerning Indian lands that have been opened for settlement and entry, dated November 27, 1911, and the Act of Congress of the United States approved April 27th, 1904 (33 Statutes at Large, page 352), entitled "An Act to ratify and amend an agreement with the Indians of Crow Indian Reservation in Montana, and making appropriation to carry the same into effect."

5. That on or about the 14th day of July, 1913, the exact date thereof being now unknown to complainant and for that reason not more definitely alleged, and ever since said date, this defendant, the Ash Sheep Company, in violation of the rules and regulations of the Secretary of the Interior of the United States and said Act of Congress aforesaid, grazed and caused to be grazed upon the tracts of land hereinabove described, and other vacant ceded Indian lands reserved for the use and benefit of said Indians, and subject to the rules and regulations and Act of Congress hereinabove referred to, a more particular description of said lands is now to complainant unknown, a large number of sheep, to-wit, about seven thousand one hundred (7,100) head; that the said sheep are being grazed, and are now trespassing in and upon the respective tracts of land hereinabove described; that the defendant company, acting by

and through its agents, servants and employees, has not obtained authority or any permit whatsoever to graze and cause to be grazed said sheep in and upon the land hereinabove specifically described, as provided by the rules and regulations of the Department of the Interior of the United States, or any other officials of the complainant thereunto duly authorized.

6. And complainant further avers that grazing permits have been duly and regularly issued by its duly authorized agents to certain persons authorizing and permitting said persons to graze their stock, to-wit, horses and cattle, upon all of the lands hereinabove described; that said persons to whom permits have been issued have complied with all the rules and regulations made and promulgated by the Secretary of the Interior in that regard and have paid all fees required thereunder.

7. Complainant further avers that the said defendant, the Ash Sheep Company, acting through its officers, agents, servants and employees, are now grazing and will continue to graze said seven thousand one hundred head of sheep in and upon the lands hereinabove referred to unless restrained by this court; that such action on the part of said defendant company and its agents, servants and employees constitutes a continuing trespass and will materially injure and destroy the use and value of said lands and cause irreparable damage to this complainant, and deprive the Crow Indians of the benefits thereof and that unless

restrained by this Honorable Court the defendant, in defiance of the express mandate of the law so enacted by the Congress of the United States, will continue to graze said seven thousand one hundred head of sheep without due and lawful authority therefor first had and obtained, and said defendant now claims to have the right to so maintain said sheep in and upon said lands so held by the United States of America for the use and benefit of the Crow Indian nation, and will thereby prevent and prohibit the United States from asserting any right whatsoever in said lands.

8. That the said defendant, the Ash Sheep Company, in all of its operations hereinbefore described, has been and will act through divers of its officers, agents and employees; that the names of said officers, agents, servants and employees are to this complainant unknown and for that reason they are not made parties to this cause in their own individual names. Complainant avers, however, that unless such officers, agents, servants and employees of the said defendant are likewise restrained by an order of this Court, they will continue to trespass upon said lands, as aforesaid, and this complainant will, when the names of said officers, agents, servants and employees shall be ascertained, ask this Honorable Court permission to enjoin said officers, agents, servants and employees as party defendants in this cause. That in consequence of the said acts of defendant company, complainant and the said Crow Indians

herein have been and are being deprived of the benefit of said lands and premises, and complainant alleges that by reason thereof the said Crow Indians and this complainant as hereinbefore set forth have sustained damages in the sum of seven thousand one hundred dollars ($7,100).

All of which actions, doings and pretenses of the said defendant and its said officers, agents, servants and employees are contrary to equity and good conscience and tend to the manifest injury and oppression of complainant in the premises

WHEREFORE, forasmuch as complainant is remediless in the premises according to the strict rule of common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable;

To the end, therefore, that said defendant, the Ash Sheep Company, may full, true, direct and perfect answer make to all and singular the matters and things hereinbefore stated and charged, but not on oath (its answer on oath being hereby expressly waived), as fully and particularly as if the same were here repeated and it thereunto distinctly interrogated; that the said defendant, the Ash Sheep Company and its officers, agents, servants and employees, during the progress of this cause and thereafter finally and perpetually may be enjoined from so grazing said seven thosand one hundred head of sheep on and upon said lands so described, and from occupying, using and

trespassing on and upon said lands without having first obtained due and proper permission or authority from the Secretary of the Interior of the United States of America, and that the said defendant, its officers, and agents, be enjoined from employing or contracting with any individual, individuals, corporation or corporations not connected with or in the employ of said defendant from continuing the trespass hereinabove complained of, and from entering upon or going on the said lands, and that the said complainant may have and recover from said defendant the sum of seven thousand one hundred dollars ($7,100) damages; and that the said complainant may have such other and further relief in the premises as may be considered just in this Honorable Court and agreeable to equity and good conscience.

May it please your Honor to grant unto this complainant a writ of subpoena of the United States of America, issued by and under the seal of this Honorable Court directed to the said defendant, the Ash Sheep Company, thereby commanding it at a certain time and under a certain penalty therein to be limited to appear before this Honorable Court and then and there full, true and direct answer make to all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against it in the premises, as shall seem fit and meet and agreeable to equity.

JAMES W. FREEMAN,
United States Attorney, District of Montana.

United States of America,
District of Montana,—ss.

James W. Freeman, being first duly sworn, deposes and says: That he is the duly appointed, qualified and acting United States Attorney for the district of Montana; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters and things therein contained are true to the best of his knowledge, information and belief.

JAMES W. FREEMAN,

Subscribed and sworn to before me this 11th day of August, A. D. 1913.

[Seal] GEO. W. SPROULE,
Clerk.

EXHIBIT "B."

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Complainant.

vs.

ASH SHEEP COMPANY,
Defendant.

Answer

Now comes the defendant and for answer to complainant's bill of complaint:

I.

Admits the allegations of paragraphs one and two.

II.

Admits the allegations of paragraph three, ex-

cept that it denies that the lands referred to in said paragraph are reserve lands, and denies that the said lands are set aside by the United States for the use and benefit of the Crow Indians. In that connection, it alleges that the lands in question were ceded to the United States by the said tribe, and that said lands are a portion of the public domain of the United States; the said tribe having no claim thereto, except that the proceeds from the disposition of said lands, to the extent provided for in the treaty and act of Congress providing for their cession shall be turned over to said tribe.

III.

Answering the allegations of paragraph four, admits that the lands referred to in said paragraph were part of the said Indian lands, but denies that the Indian title has not been extinguished, and denies that the said lands are subject to the rules and regulations made and promulgated by the Secretary of the Interior, in so far as the rules and regulations referred to provide that permits to said lands shall be granted for rentals provided, and the rentals so provided turned over to the Crow Indians. In that connection defendant alleges that said lands are public lands of the United States and that the Indian title to same has been extinguished.

IV.

Answering the allegations of paragraph five, admits that sheep belonging to defendant, to the number specified in the bill of complaint, graze

on the tracts of land described, but denies that the lands upon which they graze were reserved for the use and benefit of the Indians, and denies that the use of said lands is subject to the rules and regulations of the Indian Department, and denies that so grazing any trespass was committed.

Admits, however, that no permit to graze said sheep on said land, pursuant to the rules and regulations of the Interior Department was obtained. In that connection, however, defendant alleges that the lands in question were public lands of the United States, and that, pursuant to the policy of the Government of the United States, as to the free use of public lands for grazing and pasturage purposes, defendant a citizen of the United States, owning the sheep in question, asserted its right under that privilege and policy, and grazed its sheep on said lands.

V.

Answering the allegations of paragraph six, defendant has no knowledge or information sufficient to form a belief.

VI.

Answering the allegations of paragraph seven, admits that it is grazing its sheep, and will continue so to do on said land, unless restrained from doing so.

Denies that its doing so is a trespass, and denies that the grazing of said sheep will materially or at all destroy the value of said lands.

Denies that its grazing said sheep in the manner

herein set forth is in violation of the law, and admits that it claims to have the right to graze said sheep upon the said lands.

Denies that its grazing its sheep on said lands is in violation of any right of ownership in the United States of America, and, in that connection, avers that its grazing its sheep on said lands is in accordance with the express wish and policy of the Government of the United States, as to the use of public lands, including the land in question.

VII.

Answering the allegations of paragraph eight, admits that it will continue to use said land for grazing purposes, unless restrained from doing so, and admits that its officers and agents, in the handling of said sheep will likewise do so, unless restrained.

Denies that in consequence of the acts of defendant, complainant or the Crow Indians have been deprived of the benefit of said lands, and denies that by reason of the acts charged, or of any other acts, the Crow Indians and the complainant, or either of them, have or will sustain damage in the sum of seven thousand one hundred dollars, or any other sum or amount.

Denies that the acts charged in the complaint are contrary to equity and good conscience, or either, or tend to the manifest injury of the complainant.

Further replying to said paragraph, denies that

complainant is without remedy at law, and denies that relief is obtainable only in equity.

Further answering said bill of complaint, defendant alleges that in the bill of complaint there are set forth two causes of action which cannot be joined, to-wit, a cause of action in equity asking for injunctive relief on account of trespasses alleged to have been committed, and a cause of action for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and that by reason thereof in the bill of complaint in question there is a misjoiner of causes of action.

Further answering said complaint and that portion of same where damages are sought for the sum of seven thousand one hundred dollars, defendant avers that the claim for damages in question is made pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and as such, is a claim based on the enforcement of a penalty, and as such, is a claim that cannot be enforced in equity.

WHEREFORE, having answered complainant's bill of complaint, defendant prays that complainant's bill be dismissed, and that it be awarded its costs in this behalf expended.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Defendant.

EXHIBIT "C."

United States District Court, Montana.

UNITED STATES

vs.

ASH SHEEP CO.

This is a suit to enjoin defendant from grazing sheep on lands now determined to be Indian lands held in trust by plaintiff. (221 Fed. 587), and for damages.

Plaintiff contends that it is entitled to recover one dollar per head of sheep grazed, by virtue of Sec. 2117 R. S., which provides that any one who drives any "stock of horses, mules or cattle, to range and feed on any land belonging to an Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock." This is impossible for several reasons:

First, the statute contemplates lands so far in Indian occupancy and control that grazing will be an injury to the Indians and to which they may consent. The lands involved are otherwise.

Second, the penalty expressly attaches to "horses, mules or cattle" and sheep are not thereby included. It is apparent that Congress had in mind the particular and limited definition of the word "cattle"—animals of the bovine genus—and not the general and extended meaning—all animals of domestic kind. Otherwise, horses and mules would not have been specially mentioned, or would have been so mentioned as to indicate

but enumeration of particulars of a general class following.

To illustrate, "horses, mules or *any other* cattle." For horses and mules are within the general meaning of "cattle," even as sheep, swine, etc., are. Examination of the Acts of Congress, and especially Indian legislation, makes manifest that Congress practically invariably uses the word "cattle" in the limited sense of bovine animals, and for general inclusion makes use of the words "stock," "useful domestic animals," and "livestock." In the earliest legislation to penalize grazing Indian lands, the prohibition was of "horses or cattle," and the same act provided that the Indians would be supplied with "useful domestic animals." 1. Stat. 747. Range animals were intended, and sheep were not then ranged. U. S. vs. Mattock, Fed. Case 15744 is to the contrary but seems to lay too much stress upon the mischief intended to be remedied. A case is not within a penal statute though within the mischief of, unless also within the legislative intent as disclosed by the language used. It would seem Congress had in mind only the three classes of range animals, horses, mules and bovines, and fixed a proportionate penalty for punishment and not for confiscation as it often would be if applied to sheep or swine.

Third, if the complaint is sufficient for penalties, equity never aids the collection of statutory penalties. True, equity having jurisdiction retains it for full relief. But this for remedial and

not punitory purposes. Here, for injunction and compensatory damages, and not for punishment of which are penalties.

Fourth, the appellate tribunal remanded the suit "with directions to enter judgment for the complaint for the injunction prayed for and for such damages as the court may find complainant entitled to."

That is the law of the case.

There is no evidence of substantial damages and for the technical trespass nominal damages are awarded.

Decree will be entered for an injunction, one dollar damages and costs.

BOURQUIN, J.

EXHIBIT "D."

District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Complainant,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Decree

This cause came on regularly to be heard on the 31st day of January, 1916, upon the motion of the complainant for judgment on the mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and upon the pleadings on file in said cause, and was by counsel for complainant and defendant submitted to the court and by the

court taken under advisement;

And by it appearing to the court, and the court finds, as appears by its decision and memo filed herein and being hereof made a part, that the complainant is entitled to a perpetual injunction against the defendant, as prayed for in the bill of complaint, together with a judgment for the sum of one dollar nominal damages and costs of suit; and upon consideration thereof, and the court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the said defendant, and its officers, agents, servants, attorneys and employees be, and they are hereby perpetually enjoined and restrained from grazing the sheep of said defendant upon the lands, or any thereof, particularly mentioned and described in the plaintiff's bill of complaint;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said complainant have and recover of and from the defendant the sum of one dollar damages and its costs and disbursements incurred in said action taxed in the sum of .....Dollars.

Done in Open Court this 10th day of February, 1916.

GEO. M. BOURQUIN, Judge.

And thereafter, on July 12th, 1916, plaintiff served and filed herein its demurrer to the answer of said defendant, which demurrer to said answer

is in the words and figures following, to-wit:

In the United States District Court, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Demurrer to Answer

Now comes the plaintiff and demurs to the first defense set forth and contained in the defendant's answer, and for grounds of demurrer says:

I.

That the same does not state facts sufficient to constitute a defense to the cause of action set forth and contained in plaintiff's complaint.

And the plaintiff demurs to the first further defense and answer set forth and contained in the defendant's answer, and for grounds of demurrer says:

I.

That the same does not state facts sufficient to constitute a defense to the cause of action set forth and contained in plaintiff's complaint.

II.

That the same is insufficient in law upon the face thereof.

And the plaintiff demurs to the second further defense set forth and contained in the defendant's answer, and for grounds of demurrer says:

I.

That the same does not state facts sufficient to constitute a defense to the cause of action set forth and contained in plaintiff's complaint.

II.

That the same is insufficient in law upon the face thereof.

B. K. WHEELER,
United States Attorney.
HOMER G. MURPHY,
FRANK WOODY,
Asst. U. S. Attorneys.

Service of the within and foregoing demurrer accepted and receipt of copy thereof acknowledged this 12th day of July, 1916.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Demurrer to Answer. Filed July 12, 1916. Geo. W. Sproule, Clerk.

And, thereafter, on July 17, 1916, said demurrer coming on regularly to be heard by the court the same was by the court overruled and the court made and entered herein its order which is in the words and figures following, to-wit:

In the District Court of the United States in and for the District of Montana.

No. 506.

UNITED STATES
vs.
ASH SHEEP CO.

This cause came on regularly for hearing at this time upon demurrer to the answer, H. G. Murphy, Esq., Asst. U. S. Attorney, appearing on behalf of the United States, and C. B. Nolan, Esq., on behalf of the defendants; and thereupon demurrer submitted, and, after due consideration, it is ordered that the said demurrer be and the same hereby is overruled and plaintiff granted 5 days within which to file reply herein.

Entered in open court July 17, 1916.

GEO. W. SPROULE, Clerk.

And, thereafter, on July 20th, 1916, said plaintiff duly served and filed herein its reply to the said answer of said defendant, which reply is in words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Reply

Now comes the plaintiff and for reply to the defendant's answer filed herein;

1. Admits each and all of the allegations of paragraphs 1, 2 and 3 of the further answer set

forth and contained in said answer.

2. As to the allegations and matters set forth and contained in paragraph 4 of the further answer set forth and contained in said answer, this plaintiff denies that it has any knowledge or information thereof, or of any thereof, sufficient to form a belief.

3. As to the allegations and matters set forth and contained in paragraph 5 of the further answer set forth and contained in said answer, this plaintiff denies that it has any knowledge or information thereof, or of any thereof, sufficient to form a belief.

And for a further reply to the further answer set forth and contained in the defendant's answer, plaintiff alleges:

1. That on the 11th day of August, 1913, the plaintiff herein filed its complaint in the above entitled court against the defendant herein, a copy of which complaint is attached to the defendant's answer herein marked Exhibit "A" and made a part thereof.

2. That on the 25th day of August, 1913, the defendant filed its answer to said complaint, a copy of which answer is attached to the defendant's answer herein, marked Exhibit "E" and made a part thereof.

3. That issue was joined in said action and that conclusions of law were made by the court therein, a copy of which conclusions of law is attached to defendant's answer herein, marked Exhibit "C"

and made a part of said answer.

4. That thereafter, to-wit, on the 10th day of February, 1916, a judgment and decree was duly made and entered in said action, a copy of which said judgment and decree is attached to defendant's answer herein, marked Exhibit "D" and made a part thereof.

5. That said judgment still remains in full force and effect and stands un-appealed from.

6. Plaintiff further alleges that said defendant having appeared in said action and having filed its answer therein, wherein the defendant admitted that it had been grazing its sheep to the number of seven thousand one hundred upon the lands described in the complaint in said action and described in the complaint herein, and that the said defendant would continue so to do until restrained by an order of this court, the said defendant is now estopped from maintaining or asserting the defense set forth and contained in the further answer herein.

And for reply to the further defense set forth and contained in defendant's answer, this plaintiff;

1. Admits each and all of the allegations set forth and contained in paragraphs 1 and 2 of said further defense.

2. Denies each and every allegation and all allegations set forth and contained in paragraph 3 of said further defense.

3. Admits that issue was joined in said action;

and admits that in said cause conclusions of law were made by said court, a copy of which conclusions of law is attached to said answer, marked Exhibit "C" and made a part thereof; but save and except as herein specifically admitted, this plaintiff denies each and every other allegation, and all other allegations, set forth and contained in paragraph 4 of said further defense.

4. Admits each and all of the allegations set forth and contained in paragraphs 5 and 6 of said further defense.

5. Denies each and every allegation and all allegations set forth and contained in paragraph 7 of said further defense.

WHEREFORE the plaintiff having fully replied, prays for judgment as in its complaint.

B. K. WHEELER,
United States Attorney, District of Montana.
HOMER G. MURPHY,
Assistant U. S. Attorney, District of Montana.
FRANK WOODY,
Assistant U. S. Attorney, District of Montana.

United States of America,
District of Montana,—ss.

FRANK WOODY, being first duly sworn upon oath, deposes and says that he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana; that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

FRANK WOODY.

Subscribed and sworn to before me this 20th day of July, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Reply. Filed July 20, 1916. Geo. W. Sproule, Clerk.

And thereafter, on January 11th, 1917, the defendant filed in said court and cause its motion for judgment on the pleadings herein, which said motion is in words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant.

Motion

Now comes the defendant above named, and moves the court for judgment on the pleadings in its favor.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Motion for Judgment on the Pleadings. Filed Jan. 11th, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And said motion was thereupon argued to the court and by the court taken under consideration

and the court thereafter, to-wit, on the 11th day of January, 1917, duly filed herein its opinion in writing, which is in words and figures following, to-wit:

United States District Court, Montana.

UNITED STATES

vs.

ASH SHEEP CO.

Defendant's motion for judgment on the pleadings, is granted.

The reasons therefor are set out in U. S. vs. Ash Sheep Co., 229 Fed. 480, Paragraph 2 at least.

In addition it may be observed that Congress first enacting the statute to include "horses or cattle" only, clearly understood those words were limited to equines in the limited sense, and bovines. For later, it amended or re-enacted the statute to embrace "mules," a variety of equines.

Here is proof of it. Not only did Congress not intend "cattle" to embrace more than bovines, but so literally did it intend "horses" or "cattle," that although "horses" may import all equines and so, mules, it re-enacted the statute to include mules by express declaration.

Both horses and cattle, in their broad interpretation, include mules. Used in their narrower sense, neither included mules. Hence, the re-enactment to specify mules. Hence, also, is demonstrated that "horses, mules or cattle" in the re-enactment import the same literal or narrow sense and does not include sheep.

Penal laws, and Mischief, see—
U. S. v. Sheldon, 2 Wheat 119.

[Indorsed]: Title of Court and Cause. Memo. Filed Jan. 11, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

And thereafter, on January 24th, 1917, judgment was duly rendered and entered herein in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ASH SHEEP COMPANY, a Corporation,
Defendant.

Judgment

In this action on the 11th day of January, 1917, the above cause came on to be heard on a motion for judgment on the pleadings filed by the defendant in said action, and upon due consideration of same by the court, the said motion was by the court sustained, and it was ordered and adjudged by the court that on the pleadings in said action the defendant was entitled to a judgment in its favor.

WHEREFORE, by reason of the law and the premises aforesaid;

IT IS ORDERED, ADJUDGED and DECREED that the plaintiff in said action do recover nothing against the defendant by reason of said action.

DATED and entered this 24th day of January, 1917.

GEO. W. SPROULE, Clerk.
By C. R. GARLOW, Deputy.

Attest a true copy:
GEO. W. SPROULE, Clerk.
By C. R. GARLOW, Deputy.
[SEAL]

And thereafter, on June 15, 1918, the mandate of the United States Circuit Court of Appeals for the Ninth Circuit in said cause was received and duly filed by the Clerk, which is in the words and figures following, to-wit:

UNITED STATES OF AMERICA.—ss.

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States for the District of Montana. [Seal]

Greeting:

Whereas, lately in the District Court of the United States for the District of Montana before you, or some of you, in a cause between United States of America, Plaintiff, and Ash Sheep Company, a Corporation, Defendant, No. 506, a Judgment was duly entered on the 24th day of January, 1917, in the words and figures following, to-wit: * * *

"In this action on the 11th day of January, 1917, the above cause came on to be heard on a motion for judgment on the pleadings filed by the defend-

ant in said action, and upon due consideration of same by the court, the said motion was by the court sustained, and it was ordered and adjudged by the court that on the pleadings in said action the defendant was entitled to a judgment in its favor.

"Wherefore by reason of the law and the premises aforesaid:

"It is ordered, adjudged and decreed that the plaintiff in said action do recover nothing against the defendant by reason of said action." Which said judgment is of record and fully set out in the said cause in the office of the clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a Writ of Error prosecuted by United States of America, as Plaintiff in Error, against Ash Sheep Company, a Corporation, as Defendant in Error, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 20th day of February in the year of our Lord One Thousand Nine Hundred and Eighteen the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record and was duly argued and submitted:

On Consideration Whereof, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings.

(May 6, 1918.)

You, Therefore, are Hereby Commanded

That such further proceedings be had in the said cause in accordance with the Opinion and Judgment of this Court and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said District Court notwithstanding.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 6th day of June, in the year of our Lord One Thousand Nine Hundred and Eighteen and of the Independence of the United States of America the One Hundred and Forty-second.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth District.
By PAUL P. O'BRIEN, Deputy Clerk.

[Indorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Title of Cause. Mandate. Filed June 15, 1918, C. R. Garlow, Clerk.

And thereafter, on July 19, 1918, judgment was duly rendered and entered, which is in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

At Law, No. 506.

Judgment

The above entitled cause having come on regularly for trial on the 19th day of July, 1918, before the Court sitting without a jury, a jury having been expressly waived by the parties hereto, Homer G. Murphy, Assistant United States Attorney for the District of Montana, appearing for and on behalf of the plaintiff herein, and C. B. Nolan, Esquire, appearing as attorney for said defendant, upon the pleadings and evidence taken on behalf of said parties and the admissions of facts as stipulated and agreed to by and between said parties in open court, the cause was argued by counsel for respective parties and submitted to the Court, and by the Court taken under advisement, and the court being fully advised in the premises, it now finds that all of the allegations of the complaint are true and that said defendant on or about the 14th day of July, 1913, drove and conveyed Five Thousand (5000) head of sheep to range and feed on the lands described in the complaint herein without the consent of the Crow Tribe of Indians to which said lands belonged.

WHEREFORE, By virtue of the law and by reason of the premises, aforesaid, it is ORDERED, ADJUDGED AND DECREED that said plaintiff do have and recover from said defendant the sum of Five Thousand ($5000.00) Dollars, with interest thereon at the rate of eight per cent (8%) per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action amounting to the sum of $195.05.

Judgment rendered July 19th, 1918.

C. R. GARLOW,
Clerk of Said Court.

[Indorsed]: Title of Court and Cause. Judgment.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk U. S. District Court, District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above entitled action.

Witness my hand and the seal of said court July 19th, 1918.

C. R. GARLOW, Clerk.
[Seal] By H. H. WALKER, Deputy.

And thereafter, on July 30, 1918, a bill of exceptions was allowed and settled and duly filed herein, being in the words and figures following, to-wit:

In the District Court of the United States, in and for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,

Defendant.

Bill of Exceptions

BE IT REMEMBERED, That the above entitled cause came on for trial in the above entitled court on the 19th day of July, 1918, before the Hon. George M. Bourquin, Judge presiding, Homer Murphy, Esq., Assistant United States District Attorney, appearing as attorney for the plaintiff, and C. B. Nolan appearing as attorney for the defendant, and the following proceedings were had. Both parties to said action expressly waived trial by jury.

Thereupon and as a portion of plaintiff's case, the defendant admitted that on or about the 14th day of July, 1913, the defendant, without the consent or permission of the Crow Tribe of Indians or without the consent of the United States, drove, ranged, fed and grazed five thousand head of sheep on the lands specified in the complaint; that at this time the land in question had no settlements or entries thereon, under the laws of Congress which provided for settlements and entries being made on said land.

Thereupon the plaintiff rested, and it was agreed in behalf of the defendant that in the civil action that was brought by the United States to en-

join the defendant from trespassing on said land, the same being the action referred to in defendant's answer herein, the plaintiff in that action sought to recover as damages the penalty which it is now seeking to recover in this action.

The foregoing, with the admissions made by the pleadings, contains all of the evidence adduced at the trial of said cause.

Now comes the defendant above named and within the time provided for presents its bill of exceptions for settlement and allowance.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant.

Service of the forgoing made by delivery of copy this 29th day of July, 1918.

B. K. WHEELER,
United States District Attorney.

The foregoing bill of exceptions is correct, in all respects, and is hereby approved, allowed and settled and made a part of the record herein.

DONE in open court and dated this 30th day of July, 1918.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Bill of Exceptions. Filed July 30th, 1918. C. R. Garlow, Clerk.

And thereafter, on September 5th, 1918, petition for a writ of error was duly filed herein, being in

the words and figures following, to-wit:

In the District Court of the United States for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY,

Defendant.

No. 506.

Petition for Writ of Error

To the Honorable George M. Bourquin, Judge of the District Court aforesaid:

The Ash Sheep Company, defendant above named, feeling aggrieved by the judgment rendered and entered in the above entitled cause in the District Court of the United States for the District of Montana, on the 19th day of July, 1918, and complaining that in the record and proceedings had in said cause, and also in the rendition and entry of said judgment, manifest error has occurred to the great damage of the said defendant, as more fully appears from the assignment of errors which is filed with this petition, comes now and petitions the above entitled court for an order allowing said defendant to prosecute a writ of error out of the United States Circuit Court of Appeals in and for the Ninth Circuit, and that such writ of error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained

of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and for such other and further order as to the court may seem meet.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Petition for Writ of Error. Filed September 5, 1918. C. R. Garlow, Clerk.

And thereafter, on September 5, 1918, defendant and plaintiff in error filed its assignment of errors herein, which are in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ASH SHEEP COMPANY, a Corporation,
Defendant.

No. 506.

Assignment of Errors.

Now comes the defendant and plaintiff in error, the Ash Sheep Company, and in connection with its petition for a writ of error from the United

States Circuit Court of Appeals for the Ninth Circuit directed to the above entitled court, says that in the record, the proceedings and the final judgment made and entered in said cause on July 19th, 1918, manifest error has intervened to the prejudice of the defendant and plaintiff in error, to-wit:

I.

The District Court of the United States for the District of Montana erred in not holding that the bill of complaint does not state facts sufficient to constitute a cause of action.

II.

Said court erred in not holding that the answer of this defendant states facts sufficient to constitute a defense to the action.

III.

Said court erred in holding that the lands in question herein and over which the trespass and the grazing of sheep are alleged to have been committed and done were not public lands of the United States, nor lands over which the defendant had a right to run, or graze, or pasture its sheep.

IV.

Said court erred in holding that the said lands were Indian lands at the times in question in this cause.

V.

Said Court erred in holding that the said lands were subject to the control and the rules and regulations of the Indian Department of the United States.

VI.

Said Court erred in not holding that sheep are not animals within the provisions of Section 2117 of the Revised Statutes of the United States.

VII.

Said Court erred in not holding that sheep are not cattle within the provisions of Section 2117 of the Revised Statutes of the United States.

VIII.

Said Court erred in not holding that sheep are not stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

IX.

Said Court erred in holding that sheep are animals within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States.

X.

Said Court erred in holding that sheep are cattle within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States.

XI.

Said Court erred in holding that sheep are stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range

and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

XII.

Said Court erred in not holding that the plaintiff and defendant in error herein, having instituted an action against the defendant and plaintiff in error herein, to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said plaintiff and defendant in error elected to secure the relief which it was entitled to on account of the tresspass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said plaintiff and defendant in error ought now to be estopped from maintaining the present action.

XIII.

Said Court erred in not holding that the plaintiff and defendant in error herein, having instituted an action against the defendant and plaintiff in error herein (229 Fed. 478) to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said plaintiff and defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present

action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said plaintiff and defendant in error is estopped from maintaining the present action.

XIV.

Said Court erred in holding that the plaintiff and defendant in error herein, having instituted an action against the defendant and plaintiff in error herein (229 Fed. 478) to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said plaintiff and defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said plaintiff and defendant in error ought not to be estopped from maintaining the present action.

XV.

Said Court erred in holding that the plaintiff and defendant in error herein, having instituted an action against the defendant and plaintiff in error herein (229 Fed. 478) to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said plaintiff and defendant in error elected to secure the relief which it was entitled to

on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said plaintiff and defendant in error is not estopped from maintaining the present action.

XVI.

Said Court erred in not holding that under the pleadings herein the defendant and plaintiff in error was entitled to judgment in favor of said defendant and plaintiff in error and against said plaintiff and defendant in error.

XVII.

Said Court erred in rendering judgment herein in favor of the plaintiff and defendant in error and against the defendant and plaintiff in error.

XVIII.

Said Court erred in not rendering judgment herein in favor of the defendant and plaintiff in error and against the plaintiff and defendant in error.

XIX.

Said Court erred in entering herein a judgment in favor of said plaintiff and defendant in error and against said defendant and plaintiff in error.

XX.

Said Court erred in not entering herein a judgment in favor of said defendant and plaintiff in error and against said plaintiff and defendant in error.

WHEREFORE, Defendant and plaintiff in error prays that said judgment be reversed with directions that the cause be remanded to the United States District Court in and for the District of Montana with directions to dismiss the suit.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant and Plaintiff in Error.

Due personal service of within made and admitted and receipt of copy acknowledged this 5 day of Sept., 1918. B. K. Wheeler, U. S. Attorney.

[Indorsed]: Title of Court and Cause. Assignment of Errors. Filed Sept. 5th, 1918. C. R. Garlow, Clerk.

And thereafter, on September 5, 1918, an Order Allowing Writ of Error was signed and entered herein, which is in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ASH SHEEP COMPANY,
Defendant.

No. 506.

Order Allowing Writ of Error.

On motion of C. B. Nolan, Esquire, and William Scallon, Esquire, attorneys for defendant herein, it is hereby ordered that a writ of error from the

United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on error be fixed at the sum of Seven Thousand Dollars ($7,000.00), the same to act as a supersedeas bond and also as a bond for costs and damages on review.

GEO. M. BOURQUIN,
Judge.

Dated, September 5th, 1918.

[Indorsed]: Title of Court and Cause. Order Allowing Writ of Error. Filed Sept. 5th, 1918. C. R. Garlow, Clerk.

And thereafter, on September 5, 1918, a Bond on Error was furnished by defendant and plaintiff in error and duly filed, which bond is in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
ASH SHEEP COMPANY,
Defendant.

No. 506.

Bond on Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Ash Sheep Company, a corporation, as principal, and Chris Yegen and Peter Yegen, as sureties, of the county of Yellowstone, State and District of Montana, are held and firmly bound unto the United States of America in the sum of Seven Thousand Dollars ($7,000.00), lawful money of the United States, to be paid to it, to which payment well and truly to be made, we bind ourselves, each of us jointly and severally, by these presents:

Sealed with our seals and dated this 24th day of August, 1918.

Whereas, the above named defendant and plaintiff in error, Ash Sheep Company, is about to petition for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled case.

Now, therefore, the condition of this obligation is such that if the above named defendant and plaintiff in error shall prosecute its writ to effect, and answer all damages and costs if it fails to make its plea good, then this obligation shall be void, otherwise, to remain in full force and effect.

ASH SHEEP COMPANY, a Corporation,
By P. YEGEN, Its President.

Attest:
W. H. MOES,
Secretary.

[Corporation Seal]

CHRISTIAN YEGEN [Seal]
PETER YEGEN, [Seal]

United States of America,
District of Montana,
State of Montana,
County of Lewis and Clark,—ss.

On the 3rd day of September, 1918, personally appeared before me Chris Yegen and Peter Yegen, respectively known to me to be the persons described in and duly executed the foregoing instrument as parties surety thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Chris Yegen and Peter Yegen, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and is a householder and freeholder of the said county of Yellowstone and that he is worth the sum of Seven Thousand Dollars ($7,000.00) over and above his just debts and liabilities exclusive of property exempt from execution.

CHRISTIAN YEGEN,
PETER YEGEN.

Subscribed and sworn to before me this 3rd day of September, 1918.

L. E. TORRENCE,
Notary Public for the State of Montana, Residing at Billings, Montana. My Commission expires April 18, 1921.

[Notarial Seal]

[Indorsed]: Title of Court and Cause. Bond on Error. Aprvd. Bourquin, J. Filed Sept. 5th, 1918. C. R. Garlow, Clerk.

And thereafter, on September 5, 1918, a Writ of Error was duly issued herein, which is in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY,

Defendant.

No. 506.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to the HONORABLE GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, and to the District of the United States for the District of Montana:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in said District Court, before you, between the United States of America, plaintiff, and Ash Sheep Company, a corporation, defendant, manifest error hath occurred and happened to the said defendant, Ash Sheep Company, as by its petition for a writ of error and assignment of errors ap-

pears, we, being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the state of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in said Circuit Court of Appeals, to be then and there held, that, the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the United States Supreme Court this 5th day of September, A. D. 1918, and of the Independence of the United States the one hundred and forty-third.

[Court Seal] C. R. GARLOW,
Clerk of the District Court of the United States,
District of Montana.

Due personal service of the foregoing writ of error made and admitted and receipt of a copy thereof acknowledged this 5th day of Sept. A. D. 1918.

B. K. WHEELER,

United States District Attorney for the District of Montana.

H. G. MURPHY,

Assistant United States District Attorney for the District of Montana.

[Indorsed]: Title of Court and Cause. Writ of Error. Filed Sept. 5th, 1918. C. R. Garlow, Clerk.

And thereafter, on September 5, 1918, a citation was duly issued herein, which is hereto attached and is in words and figures following, to-wit:

In the District Court of the United States for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ASH SHEEP COMPANY,

Defendant.

No. 506.

Citation.

United States of America,—ss.

To the United States of America, plaintiff herein, and to B. K. Wheeler, Esq., United States District Attorney for the District of Montana:

You are hereby notified that in a certain cause wherein the United States of America is plaintiff and the Ash Sheep Company is defendant pending in the District Court of the United States for the District of Montana, a writ of error has been al-

lowed and granted to said defendant to the Circuit Court of Appeals of the United States for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Circuit Court of Appeals at the City of San Francisco in the State of California, within said Ninth Circuit, thirty days after the date of this citation, to show cause, if any there be, pursuant to said writ of error, why the judgment made and entered in said cause in said District Court should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable George M. Bourquin, Judge of the District Court of the United States for the District of Montana, this 5th day of September, 1918.

GEO. M. BOURQUIN,
Judge.

Due personal service of the foregoing citation made and admitted and receipt of a copy thereof acknowledged this 5th day of September, A. D. 1918.

B. K. WHEELER,
United States District Attorney for the District of Montana.

H. G. MURPHY,
Assistant United States District Attorney for the District of Montana.

[Indorsed]: Title of Court and Cause. Citation. Filed Sept. 5th, 1918. C. R. Garlow, Clerk.

And thereafter, on September 5, 1918, defend-

ant and plaintiff in error duly served and filed herein its praecipe for transcript of record, which is in words and figures following:

In the District Court of the United States for the District of Montana, Helena Division.

UNITED STATES OF AMERICA,
Plaintiff and Defendant in Error,

vs.

ASH SHEEP COMPANY,
Defendant and Plaintiff in Error.

No. 506.

Praecipe for Transcript of Record.

To B. K. Wheeler, Esq., United States District Attorney for the District of Montana, and Homer G. Murphy, Esq., Assistant United States District Attorney for the District of Montana, and Charles R. Garlow, clerk of said court:

You, and each of you, will please take notice that the undersigned, the attorneys for the defendant and plaintiff in error above named, hereby serves upon you and each of you this praecipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above entitled cause which said defendant and plaintiff in error desires to and will incorporate its transcript of record on writ of error herein, to-wit, the writ of error issued herein on the 5th day of September, 1918, to have the judgment hereinbefore rendered and entered herein reviewed by the United States Circuit Court of Appeals for the

Ninth Circuit, and the clerk of said District Court will incorporate and include in said transcript the following:

1. The judgment roll or final record in said cause consisting of the complaint, summons, demurrer to complaint, answer, demurrer to an-answer, reply, motion for judgment on pleadings, decision of court, judgment entered January 24th, 1917, mandate issued by the United States Circuit Court of Appeals for the Ninth Circuit and dated June 6th, 1918, and judgment entered July 19th, 1918;

2. Bill of Exceptions signed and filed on July 30th, 1918.

3. Order granting leave to withdraw demurrer to complaint, and leave to file answer;

4. Order overruling demurrer to answer.

5. Petition for writ of error and order allowing same.

6. Assignment of errors filed with petition for writ of error.

7. Writ of Error; and Bond on Error.

8. Citation on writ of error and acknowledgment of service by plaintiff and defendant in error.

9. Copy of this praecipe.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant and Plaintiff in Error.

Service of the foregoing praecipe and receipt of a copy thereof this 5th day of September, 1918, is

hereby admitted and acknowledged.

B. K. WHEELER,
United States District Attorney for the District of Montana.

H. G. MURPHY,
Assistant United States District Attorney for the District of Montana.

[Indorsed]: Title of Court and Cause. Praecipe for Transcript of Record. Filed Sept. 5th, 1918. C. R. Garlow, Clerk.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 65 pages, numbered consecutively from 1 to 65, both inclusive, is a true and correct transcript of all pleadings, process, order, decree, decision, and all proceedings in said cause required to be incorporated in the record on writ of error by the praecipe of defendant and plaintiff in error for said record, and consists of full, true, correct and complete copies of the complaint, demurrer to complaint, order allowing withdrawal of said demurrer and filing of answer, answer, demurrer to answer, order overruling demurrer to answer, reply, motion for judgment on pleadings, decision

of court, judgment entered January 24th, 1917, mandate issued by the United States Circuit Court of Appeals for the Ninth Circuit dated June 6th, 1918, judgment entered July 19th, 1918, petition for writ of error, order allowing writ of error, assignment of errors, bond on error, writ of error, citation, praecipe for transcript of record, and of the whole thereof as the same appear from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within the paging thereof the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of .... Dollars and have been made a charge against plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this.....day of....., A. D. 1918.

.....

[Seal] Clerk.

hereby admitted and acknowledged.

B. K. WHEELER,

United States District Attorney for the District of Montana.

H. G. MURPHY,

Assistant United States District Attorney for the District of Montana.

[Indorsed]: Title of Court and Cause. Praecipe for Transcript of Record. Filed Sept. 5th, 1918. C. R. Garlow, Clerk.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 65 pages, numbered consecutively from 1 to 65, both inclusive, is a true and correct transcript of all pleadings, process, order, decree, decision, and all proceedings in said cause required to be incorporated in the record on writ of error by the praecipe of defendant and plaintiff in error for said record, and consists of full, true, correct and complete copies of the complaint, demurrer to complaint, order allowing withdrawal of said demurrer and filing of answer, answer, demurrer to answer, order overruling demurrer to answer, reply, motion for judgment on pleadings, decision

of court, judgment entered January 24th, 1917, mandate issued by the United States Circuit Court of Appeals for the Ninth Circuit dated June 6th, 1918, judgment entered July 19th, 1918, petition for writ of error, order allowing writ of error, assignment of errors, bond on error, writ of error, citation, praecipe for transcript of record, and of the whole thereof as the same appear from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within the paging thereof the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of .....
..... Dollars and have been made a charge against plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this.....day of....., A. D. 1918.

.....

[Seal] Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3229.

ASH SHEEP COMPANY, A Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Upon Writ of Error to the United States District Court for the District of Montana.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3229.

ASH SHEEP COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Stipulation. Re Submission of Cause on Briefs, Etc.

It is hereby stipulated and agreed by and between parties hereto, acting through their respective counsel of record that the said cause may be placed upon the calendar of the October Term, 1918, and that the said cause may be submitted to the court without argument and upon briefs on the 25th day of October, 1918.

Dated this 8th day of October, 1918.

C. B. NOLAN,
WM. SCALLON,
Attorneys for Plaintiff in Error.
B. K. WHEELER,
U. S. District Attorney for the District of Montana.
H. G. MURPHY,
Ass't U. S. Att'y.

Dated: San Francisco, Cal., October 11, 1918.

Ordered cause assigned for October 25, 1918, to be submitted on briefs, without oral argument.

WM. B. GILBERT,
Senior U. S. Circuit Judge.

[Endorsed:] Stipulation. Filed Oct. 14, 1918. F. D. Monckton, Clerk.

At a Stated Term, to wit: the October Term A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-fifth day of October, in the year of our Lord One Thousand, Nine Hundred and Eighteen.

Present:

The Honorable William B. Gilbert, Senior Circuit Judge, Presiding.
The Honorable Erskine M. Ross, Circuit Judge.
The Honorable William H. Hunt, Circuit Judge.

No. 3229.

ASH SHEEP COMPANY, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Order of Submission.

Pursuant to stipulation of counsel for the respective parties, filed October 11, 1918, and good cause therefor appearing, ordered cause submitted to the Court for consideration and decision, on briefs, without oral argument.

At a Stated Term, to wit: the October Term A. D. 1918, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the second day of December, in the year of our Lord One Thousand, Nine Hundred and Eighteen:

Present:

The Honorable William W. Morrow, Circuit Judge, Presiding.

The Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable William B. Gilbert, Erskine M. Ross and William H. Hunt, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this court in each of the following-entitled causes be forthwith filed by the Clerk, and that a Judgment or Decree be filed and recorded in the Minutes of this Court in each of the said causes in accordance with the opinion filed therein:

* * * * * * *

No. 3229.

ASH SHEEP COMPANY, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

* * * * * * *

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3229.

UNITED STATES OF AMERICA, Plaintiff and Defendant in Error,

vs.

ASH SHEEP COMPANY, a Corporation, Defendant and Plaintiff in Error.

Opinion, United States Circuit Court of Appeals.

Writ of Error from the United States District Court for the District of Montana.

Mr. Burton K. Wheeler, United States Attorney, and Mr. James H. Baldwin, Assistant United States Attorney, of Butte, Montana, and Mr. Homer G. Murphy, Assistant United States Attorney, of Helena, Montana, Attorneys for Plaintiff and Defendant in Error.

Mr. C. B. Nolan and Mr. William Scallon, of Helena, Montana, Attorneys for Defendant and Plaintiff in Error.

Before Gilbert, Ross and Hunt, Circuit Judges.

HUNT, *Judge:*

By writ of error the Ash Sheep Company seeks a reversal of a judgment entered against it for five thousand dollars in favor of the United States in an action brought in the District of Montana by the United States to recover the penalties provided by Section 2117 Rev. Stats. (Comp. St., 1916, Sec. 4107).

The origin of the case and its history are given in the opinion we expressed in United States vs. Ash Sheep Company, 250 Fed., 592. It is therefore only now necessary to

recite that after we reversed the judgment of the lower Court and remanded the case for further proceedings there was a trial to the District Court upon an agreed statement of facts, whereby it was admitted that in July, 1913, the Sheep Company, without the consent of the Crow Tribe of Indians, or of the United States, drove, ranged and fed five thousand head of sheep on the lands specified in the complaint; that at that time the land in question had no settlements or entries thereon under the laws of the United States which provided for settlement and entry being made upon the land; and that in the civil suit brought by the United States to enjoin the Sheep Company from trespassing on the land, the suit being that referred to in the answer of the Sheep Company filed in this action, Ash Sheep Co. v. United States, 250 Fed., 591, the United States sought to recover as damages the penalties it is herein seeking to recover.

The foregoing statement and the assignments of error disclose that the present case presents the same questions, and only those, which were directly involved in and were considered and decided by this Court upon the former writ of error; and counsel for the Sheep Company state in their brief that the writ of error herein is prosecuted for the purpose of saving the right to seek a review of our former opinion by the Supreme Court.

As no reason occurs to us for reversing the views we announced in our earlier opinion, we abide by it, and affirm the judgment of the District Court.

Affirmed.

[Endorsed:] Opinion. Filed Dec. 2, 1918. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3229.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the District of Montana.

Judgment.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Montana, and was duly submitted:

On consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed:] Judgment. Filed and entered December 2, 1918. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Petition for and Order Allowing Writ of Error from Supreme Court of the United States and Fixing Amount of Bond on Writ of Error.

To the Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes the Ash Sheep Company, a corporation, Plaintiff in Error herein, by C. B. Nolan, Esq., and Wm. Scallon,

Esq., its attorneys, and feeling aggrieved by the judgment of this court made and entered in the above entitled action on the 2nd day of December, 1918, affirming a judgment of the District Court of the United States, in and for the District of Montana, made and entered on the 19th day of July, 1918, in favor of the Defendant in Error and against the Plaintiff in Error, and prays the court for a writ of error to the Supreme Court of the United States in said cause, and that the transcript of the record and proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to the said Supreme Court of the United States; and also prays that an order be made fixing the amount of security the plaintiff in error shall give and furnish upon the said writ of error.

C. B. NOLAN,
WILLIAM SCALLON,
Attorneys for Plaintiff in Error.

The writ of error as prayed for in the foregoing Petition is hereby granted; and it is ordered that the bond on error be fixed at the sum of seven thousand dollars ($7,000.00), the same to act as a supersedeas bond and also as a bond for costs and damages of review.

W. H. HUNT,
Dated December 31, 1918. *Judge.*

[Endorsed:] Petition for and Order Allowing Writ of Error from Supreme Court of the United States and Fixing Amount of Bond on Writ of Error. Filed Dec. 31, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Assignment of Errors.

Now comes the Ash Sheep Company, a corporation, plaintiff in error herein, and in connection with its petition for a

writ of error from the Supreme Court of the United States directed to the above entitled court, says that in the record, the proceedings and the final judgment made and entered in said cause, on December 2, 1918, manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

I.

The United States Circuit Court of Appeals for the Ninth Circuit erred in not holding that the bill of complaint does not state facts sufficient to constitute a cause of action.

II.

Said court erred in not holding that the answer of this plaintiff in error states facts sufficient to constitute a defense to the action.

III.

Said court erred in holding that the lands in question herein and over which the trespass and the grazing of sheep are alleged to have been committed and done were not public lands of the United States, nor lands over which the plaintiff in error had a right to run, or graze, or pasture its sheep.

IV.

Said court erred in holding that the said lands were Indian lands at the times in question in this cause.

V.

Said Court erred in holding that the said lands were subject to the control and the rules and regulations of the Indian Department of the United States.

VI.

Said Court erred in not holding that sheep are not animals within the provisions of Section 2117 of the Revised Statutes of the United States.

VII.

Said Court erred in not holding that sheep are not cattle within the provisions of Section 2117 of the Revised Statutes of the United States.

VIII.

Said Court erred in not holding that sheep are not stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

IX.

Said Court erred in holding that sheep are animals within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States.

X.

Said Court erred in holding that sheep are cattle within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States.

XI.

Said Court erred in holding that sheep are stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

XII.

Said Court erred in not holding that the defendant in error herein having instituted an action against the plaintiff

in error herein to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action and having recovered damages for said trespass in said action, said defendant in error ought now to be estopped from maintaining the present action.

XIII.

Said Court erred in not holding that the defendant in error herein having instituted an action against the plaintiff in error herein to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said defendant in error is estopped from maintaining the present action.

XIV.

Said court erred in holding that the defendant in error herein having instituted an action against the plaintiff in error herein to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said defendant in error ought not to be estopped from maintaining the present action.

XV.

Said court erred in holding that the defendant in error herein, having instituted an action against the plaintiff in error herein, to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action and having recovered damages for said trespass in said action, said defendant in error is not estopped from maintaining the present action.

XVI.

Said court erred in not holding that under the pleadings herein the plaintiff in error was entitled to judgment in its favor and against said defendant in error.

XVII.

Said court erred in affirming the judgment of the District Court of the United States for the District of Montana made and entered in this cause on the 19th day of July, 1918.

XVIII.

Said court erred in not reversing the judgment of said District Court of the United States for the District of Montana made and entered in said cause on the 19th day of July, 1918.

XIX.

Said court erred in not directing the said District Court of the United States for the District of Montana to enter a final judgment in said cause in favor of the defendant (plaintiff in error herein) and against said plaintiff (defendant in error herein).

XX.

Said court erred in following its opinion rendered upon the former review of this cause and in not reversing the same.

XXI.

Said court had erred in its former review of this cause in reversing the decision of the District Court of the United States in and for the District of Montana, in remanding the cause to said District Court for further proceedings, and in directing that such further proceedings be had in the said cause by said District Court, in accordance with the said opinion and judgment of said United States Circuit Court of Appeals on May 6, 1918, to-wit, the former review of this cause.

XXII.

Said court had erred in the former review of this cause in holding that the lands in question herein and over which the trespass and the grazing of sheep are alleged to have been committed and done were not public lands of the United States, nor lands over which the defendant (plaintiff in error herein) had a right to run, or graze, or pasture its sheep.

XXIII.

Said court had erred in the former review of this cause in holding that the said lands were subject to the control and the rules and regulations of the Indian Department of the United States.

XXIV.

Said Court had erred in the former review of this cause in not holding that sheep are not animals within the provisions of Section 2117 of the Revised Statutes of the United States.

XXV.

Said Court had erred in the former review of this cause in not holding that sheep are not cattle within the provisions of Section 2117 of the Revised Statutes of the United States.

XXVI.

Said Court had erred in the former review of this cause in not holding that sheep are not stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

XXVII.

Said Court had erred in the former review of this cause in holding that sheep are animals within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States.

XXVIII.

Said Court had erred in the former review of this cause in holding that sheep are cattle within the meaning of the provisions of Section 2117 of the Revised Statutes of the United States.

XXIX.

Said Court had erred in the former review of this cause in holding that sheep are stock within the meaning of Section 2117 of the Revised Statutes of the United States for which a person who drives or otherwise conveys them to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

XXX.

Said Court had erred in the former review of this cause in not holding that the defendant in error herein, having instituted an action against the plaintiff in error herein, to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said defendant in error ought now to be estopped from maintaining the present action.

XXXI.

Said Court had erred in the former review of this cause in not holding that the defendant in error herein, having instituted an action against the plaintiff in error herein to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said defendant in error is estopped from maintaining the present action.

XXXII.

Said Court had erred in the former review of this cause in holding that the defendant in error herein, having instituted an action against the plaintiff in error herein to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it

sought to recover in said action, and having recovered damages for said trespass in said action, said defendant in error ought to be estopped from maintaining the present action.

XXXIII.

Said Court had erred in the former review of this cause in holding that the defendant in error herein, having instituted an action against the plaintiff in error herein to recover as damages the penalty which it sought to recover in the present suit, and having secured a judgment in said suit, that the said defendant in error elected to secure the relief which it was entitled to on account of the trespass complained of, which is the same trespass complained of in the present action, and having so elected to recover the damages which it sought to recover in said action, and having recovered damages for said trespass in said action, said defendant in error is not estopped from maintaining the present action.

XXXIV.

Said Court had erred in the former review of this cause in not holding that under the pleadings herein the plaintiff in error was entitled to judgment in favor of said plaintiff in error and against said defendant in error.

XXXV.

Said Court erred in deciding for the defendant in error and against the plaintiff in error.

Wherefore plaintiff in error prays that the said judgment of said United States Circuit Court of Appeals for the Ninth Circuit made and entered on the 2nd day of December, 1918, be reversed, with directions that the cause be remanded to the United States District Court in and for the District of Montana, with directions to that court to dismiss the suit.

C. B. NOLAN,
WILLIAM SCALLON,
Attorneys for Plaintiff in Error.

[Endorsed:] Assignment of Errors. Filed Dec. 31, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Bond on Writ of Error from Supreme Court U. S.

Know All Men By These Presents, That we, Ash Sheep Company, a corporation, as principal, and Chris Yegen and Peter Yegen, as sureties, of the county of Yellowstone, State and District of Montana, are held and firmly bound unto the United States of America in the sum of seven thousand dollars ($7,000.00), lawful money of the United States, to be paid to it, to which payment well and truly to be made we bind ourselves, each of us jointly and severally by these presents:

Sealed with our seals and dated this 26th day of December, 1918.

Whereas, the above-named Plaintiff in Error, Ash Sheep Company, is about to petition for a writ of error from the United States Supreme Court in the above entitled case.

Now, Therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its writ to effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void, otherwise to remain in full force and effect.

[SEAL.]

ASH SHEEP CO., A CORPORATION,
By P. YEGEN,
Its President.

Attest:

W. H. MOER,
Secretary.

CHRIS YEGEN. [SEAL.]
PETER YEGEN. [SEAL.]

UNITED STATES OF AMERICA,
District of Montana, County of Yellowstone, ss:

On the 26th day of December, 1918, personally appeared before me Chris Yegen and Peter Yegen respectively known to me to be the persons described in and who duly executed the foregoing instrument as parties surety thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth.

And the said Chris Yegen and Peter Yegen, being respectively by me duly sworn, says, each for himself and not one for the other, that he is a resident and is a householder and freeholder of the said county of Yellowstone and that he is worth the sum of Seven Thousand Dollars ($7,000.00) over and above his just debts and liabilities exclusive of property exempt from execution.

CHRIS YEGEN.
PETER YEGEN.

Subscribed and sworn to before me this 26th day of December, 1918.

[SEAL.] L. E. DARRENCE,
Notary Public for the State of Montana;
Residing at Billings, Montana.

My commission expires April 18, 1921.

This bond approved as to amount and sureties this 27th day of December, 1918.

EDWARD C. DAY,
United States District Attorney
for the District of Montana.

The foregoing bond and surety approved this 31st day of December, 1918.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed:] Bond on Writ of Error from Supreme Court U. S. Filed Dec. 31, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3229.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Præcipe for Certified Transcript of Record on Return to Writ of Error from Supreme Court of United States.

To the Clerk of Said Court.

SIR: Please make and furnish me with a certified transcript of the record (including the proceedings had in said Circuit Court of Appeals), for use on Writ of Error returnable in the Supreme Court of the United States in the above-entitled cause, the said transcript to consist of a copy of the following:

Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a typewritten copy of the following-entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz:

Order of submission, entered October 25, 1918; Order directing filing of opinion, etc., entered December 2, 1918;

Opinion, filed December 2, 1918;

Judgment, filed and entered December 2, 1918;

The following papers on Writ of Error returnable in the Supreme Court of the United States:

Petition for and order allowing Writ of Error and fixing amount of bond, filed December 31, 1918;

Assignment of Errors, filed December 31, 1918;

Bond on Writ of Error, filed December 31, 1918;

Præcipe for transcript of record;

Writ of Error;

Citation on Writ of Error;

Certificate of Clerk, U. S. Circuit Court of Appeals, to transcript of record.

C. B. NOLAN AND
WM. SCALLON,
Attorneys for Plaintiff in Error.

Service of the within præcipe is admitted this 6th day of January, 1919.

C. E. DAY,
United States Attorney,
Attorney for Defendant in Error.

[Endorsed:] Præcipe for Transcript of Record on Return to Writ of Error, Supreme Court of the United States. Filed Jan. 9, 1919. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3229.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Return to Writ of Error from the Supreme Court of the United States.

I, F. D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighty-four (84) pages, numbered from and including 1 to and including 84, to be a full, true and correct copy of the record, and of the Assignment of Errors, and of all proceedings had in the above entitled case, made up pursuant to the præcipe filed by counsel for the plaintiff in error on the 9th day of January, A. D. 1919, under Rule 8 of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office, and that the same constitute the Transcript of Record and return

to the Writ of Error from the Supreme Court of the United States in the above-entitled case, as made up and certified pursuant to said præcipe.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this tenth day of January, A. D. 1919.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk.
By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Because in the records and proceedings, and also in the rendition of the judgment, of a plea which is in said United States Circuit Court of Appeals for the Ninth Circuit, before you, or some of you, between the Ash Sheep Company, a corporation, plaintiff in error, and the United States of America, defendant in error, manifest error hath occurred and happened to the said plaintiff in error, Ash Sheep Company, as by its petition for a writ of error and assignment of errors appears, we, being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the city of Washington, D. C., within sixty days from the date of this writ in said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 31st day of December in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States the one hundred and forty-third.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit,

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

By PAUL P. O'BRIEN,
Deputy Clerk.

The above writ of error is hereby allowed by Wm. H. Hunt, United States Circuit Judge.

W. H. HUNT,
U. S. Circuit Judge.

Service of the foregoing Writ of Error and receipt of a true copy admitted this 6th day of January, 1919.

E. C. DAY,
United States District Attorney for the District of Montana.

[Endorsed:] Docket No. 3229. United States Circuit Court of Appeals, for the Ninth Circuit. Ash Sheep Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Jan-

uary 9, 1919. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. C. B. Nolan and Wm. Scallon, Helena, Montana, Attorneys for Plaintiff's in Error.

United States Circuit Court of Appeals for the Ninth Circuit.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 10th day of January, A. D., 1919.

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT,

By F. D. MONCKTON,
Clerk,

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

ASH SHEEP COMPANY, a Corporation, Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Plaintiff and Defendant in Error, and to E. C. Day, Esq., United States District Attorney, its Attorney, Greeting:

You are hereby notified that in a certain cause wherein, the United States of America is plaintiff and defendant in error and the Ash Sheep Company is defendant and plaintiff in error pending in the United States Circuit Court of Appeals for the Ninth Circuit, a writ of error has been allowed and granted to said plaintiff and defendant in error from the United States Supreme Court.

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be held in the city of Washington, D. C., within sixty days from the date of this citation, to show cause, if any there be, pursuant to said writ of error, why the judgment made and entered in said cause in said United States Circuit Court of Appeals should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Wm. H. Hunt, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, this 31st day of December, 1918, and of the Independence of the United States the one hundred and forty-third.

WM. H. HUNT,
Judge of the Circuit Court of Appeals for the Ninth Circuit.

Service of the foregoing citation and receipt of true copy admitted this 6th day of January, 1919.

E. C. DAY,
United States District Attorney
for the District of Montana.

[Endorsed:] Docket No. 3229. United States Circuit Court of Appeals, for the Ninth Circuit. Ash Sheep Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Filed January 9, 1919. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. C. B. Nolan and Wm. Scallon, Helena, Montana, Attorneys for Plaintiff in Error.

Endorsed on cover: File No. 26,923. U. S. Circuit Court of Appeals, —— Circuit. Term No. 837. Ash Sheep Company, plaintiff in error, vs. The United States of America. Filed February 7th, 1919. File No. 26,923.

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Supreme Court
of the
United States

NO. 212.
ASH SHEEP COMPANY,
Appellant.
vs.
THE UNITED STATES OF AMERICA,
Appellee.

NO. 285.
ASH SHEEP COMPANY,
Plaintiff in Error.
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

There are presented for review two appeals, Causes Nos. 212 and 285. In both cases, the same legal question arises as to whether the land trespassed upon is public land or reserved land sub-

ject to the jurisdiction of the Indian Department. In case No. 285, where a penalty is recovered, additional questions are presented. The United States brought suits against the Ash Sheep Company, appellant and plaintiff in error. The equitable action was brought to enjoin trespass on certain lands alleged to be a part of the Crow Indian Reservation in the State of Montana, and to recover damages in the sum of $7,100.00 on account of the trespasses committed. In the bill of complaint it was alleged that in the year 1868, the United States and the Crow tribe of Indians entered into a treaty by which the Crow Indian Reservation was set aside for the use and benefit of the Crow Indians; that the United States was the owner and entitled to the possession of the land on which the trespasses were committed, and that this land was within the original boundaries of the Reservation; that the land was a part of the vacant ceded lands, and that the Indian title to same had not been extinguished, and was subject to the rules and regulations promulgated by the Secretary of the Interior concerning Indian lands that were open for settlement and entry, dated November 27, 1911, and the Act of Congress of the United States approved April 27, 1904, (33 Stat. at Large, page 352); that the Ash Sheep Company in violation of these rules and regulations and the Act of Congress grazed and caused to be grazed seventy-one hundred head of sheep on this

land without authority or permit; that grazing permits for the land had been duly and regularly issued by the United States to certain persons, and that these persons had complied with the regulations referred to and had paid the fees required. It was then alleged that the Ash Sheep Company was grazing its sheep on these lands, and would continue to do so unless restrained, and that it claimed a right to do so. A restraining order was asked for and damages in the sum of $7,100.00. (Complaint, Tr. pp. 6-7). The Ash Sheep Company in its answer denied that the lands were set aside for the use and benefit of the Indians, and alleged that the land in question was a portion of the public domain; that the Indians had no claim to the land, except that the proceeds from its sale should be turned over to them. There was a denial likewise that the Indian title had not been extinguished, and a denial that the lands were subject to the rules and regulations referred to. It denied that the lands were reserved for the use and benefit of the Indians, and denied that any trespasses were committed. It admitted that the grazing took place, and was without any permit, and that it was its intention to continue the grazing of the sheep on the land unless restrained from so doing; that the grazing was on public lands, and in accordance with the public policy of the United States, (Answer, Tr. pp. 11 to 14). Upon a hearing on an order to show cause, the trial

court denied the application for a preliminary injunction and vacated the temporary restraining order theretofore issued, and on a final hearing, the action was dismissed and a final decree providing for a dismissal of the action was duly made and entered. (Tr. pp. 23-24). An appeal was taken to the Circuit Court of Appeals of the Ninth Circuit. On this appeal, the decree dismissing the action was reversed, and the case was remanded to the District Court with directions to enter judgment for the injunction prayed for and for such damages as the court might find the United States was entitled to. (Tr. pp. 25-26). A trial was had. It was contended upon the part of the Government that damages should be fixed at the sum of $7,100.00, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States. (Tr. p. 31). The United States offered no proof to show what the actual damages were, if any, so a decree was entered providing for a permanent injunction and $1.00 damages. (Tr. pp. 29-30). From this decree, an appeal was taken to the Circuit Court of Appeals by the Ash Sheep Company. (Tr. pp. 35 to 44). On this appeal, the decree was affirmed (Tr. p. 57), and an appeal was taken to this court. (Tr. pp. 52 to 66).

The second action, No. 285, was then instituted by the United States to recover the penalty which it sought to recover in the equitable action above referred to. The allegations of the complaint are

practically the same as those in the equitable action, and a judgment was prayed for in the sum of $7,100.00. (Tr. p. 5). The Ash Sheep Company in its answer set up that the land was originally within the Crow Reservation and was land to which the Act of Congress approved April 27, 1904 applied, that pursuant to this Act and pursuant to the proclamation of the President, portions of this land were settled, title acquired to same by settlers, and these settlers were promiscuously scattered over the entire tract; that it owned in this ceded strip large tracts of land, of the title to which, the United States had been divested, and also had acquired rights as lessees to other large tracts; that these tracts were in close proximity to the lands on which it was claimed trespasses were committed, and that in getting its sheep from one tract to another which it owned or leased, it necessarily drove three thousand or four thousand head of sheep over the land, the title to which was still in the United States, and that it would be impossible for the company to use its lands without this being done. The decree in the equitable action was pleaded as an estoppel. It was alleged that the United States having elected to recover damages in the equitable action, it should be estopped from recovering damages in the instant action, and should be estopped from maintaining the action to recover the penalty, seeking as it did to recover same in

the equitable action and having failed. A motion for judgment on the pleadings was interposed by plaintiff in Error (Tr. p. 38) and sustained, on the ground that sheep were not covered by the law authorizing the penalty, (Tr. p. 38) and a judgment was entered accordingly. The case was taken to the Court of Appeals on a writ of error by the United States, and the judgment of the lower court was reversed. Upon a trial of the case, it was agreed that five thousand head of sheep were driven on the land, and a judgment for $5,000 and costs amounting to $195.05, was rendered. Again the case was taken to the Court of Appeals by the Ash Sheep Company. (Tr. p. 48). There was an affirmance of the judgment (Tr. p. 70), and in that case the Ash Sheep Company is in this court on a writ of error. To summarize, in the equitable action, the Court of Appeals considered the case twice and in the action for the recovery of the penalty, that case was likewise considered twice by that tribunal. The decisions bearing on the different questions which it considered appear in the Federal Reporter, as follows:

221 Fed. 587.
229 Fed. 479;
250 Fed. 591;
250 Fed. 592;
254 Fed. 59.

SPECIFICATION OF ERRORS.

I.

The Court erred in holding that the land in question was not public land on which the plaintiff in error had a right to graze its sheep.

II.

The court erred in holding that the land was Indian land and subject to the control, rules and regulations of the Interior Department.

III.

The court erred in holding that a permanent injunction should issue against the plaintiff in error from pasturing its sheep on the lands.

IV.

The court erred in holding that a decree should be entered against the plaintiff in error in the equitable action.

V.

The court erred in the action to recover a penalty in reversing the judgment of the trial court and ordering that judgment should be entered for the United States.

VI.

The court erred in holding that sheep were animals within the provisions of Section 2117 of the Revised Statutes of the United States.

VII.

The court erred in affirming the judgment of the trial court.

VIII.

The court erred in not holding that the United States in the equitable action, having secured a judgment therein for damages and having elected to recover damages in said action, was estopped from maintaining the action to recover the penalty.

IX.

In both cases, the court erred in holding that the complaints stated causes of action, or would support judgments against the plaintiff in error and appellant.

ARGUMENT.

There are two main propositions which we desire to discuss:

(a) The first one has to do with both causes of action, and that is as to the character of the land in question, as to whether it is public domain to which the plaintiff in error had a right of access. If we are correct in this contention, then the judgments in both cases must be reversed.

(b) The second question has to do with the construction of Section 2117 of the Revised Statutes of the United States, and even though the land is of the character that is contended for by the United States, if sheep are not embraced within the provisions of the section in question, then the judgment for the recovery of the penalty cannot stand.

Incidentally, we desire to present likewise the question as to whether in the equitable action, as the government sought to recover this penalty in the form of damages, and having failed, recovering nominal damages, it was estopped from maintaining a separate action thereafter, not having appealed from the decree in the equitable action.

CHARACTER OF LAND.

The Crow Indian Reservation was set aside in 1869 for the use and benefit of the Crow Indian tribe. In 1899, an agreement was entered into

with the Crow Indian tribe, by which a portion of the Reservation was ceded to the United States. (33 Statutes at Large, Part One, page 352, chapter 1624). In article 1 of this agreement, it is provided:

> "That the said Indians of the Crow Reservation do hereby cede, grant and relinquish to the United States all right, title and interest which they may have to the lands embraced within and bounded by the following-described lines: * * *".

Article II of the agreement provides as follows:

> "That in consideration of the land ceded, granted and relinquished as aforesaid, the United States stipulates and agrees to pay to and expend for the Indians of the said reservation eleven hundred and fifty thousand dollars, in the following manner, to-wit: * * *".

Article III provides that Indians to whom allotments might have been made on this ceded strip should remain or select lieu lands.

This agreement was modified and amended by the Act of Congress of April 27, 1904. (33 Stat. at Large, *supra.*) As in the original agreement, Article I of the Act provides as follows:

> "That the said Indians of the Crow Reservation do hereby cede, grant, and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following described lines: * * *"

Article II of said section provides, as follows:

"That in consideration of the lands ceded, granted, relinquished, and conveyed by article one of this agreement, the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the reclamation Act approved June seventeenth, nineteen hundred and two, the homestead, townsite, and mineral land laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, at not less than four dollars per acre, subject to the provisions in section five, the United States to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, at one dollar and twenty-five cents per acre, and to pay the said Indians the proceeds derived from the sale of said lands, and for the said sections sixteen and thirty-six, or an equivalent of two sections in each township, as follows: * * *".

Section 4 of Article IX of the Act provides as follows:

"That the Commissioner of Indian Affairs shall cause allotments to be made, in manner and quantity as provided by existing law, of the lands occupied and cultivated by any Indians on the portion of the reservation by said agreement ceded and relinquished, as required by article three thereof; and where such Indian occupants elect to remove to the diminished reservation he shall cause a schedule to be prepared showing the names of such occupants, the descriptions of the lands, and the character of the improvements thereon. Such improvements shall then be appraised and sold under the direction of the Secretary of the Interior to the highest bidder, no sale to be for less than the appraised value, the proceeds to be paid to the respective In-

dian occupants as required by said article three. *Provided,* That the purchaser of such improvements shall have a preference right, if otherwise qualified, of thirty days after the land becomes subject to entry within which to enter the lands upon which the improvements are located, not exceeding one hundred and sixty acres, in compliance with the provisions herein governing the disposition of said ceded lands.

The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove he shall also fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold."

Section 5 of the same article of the Act provides as follows:

"That before any of the lands by this agreement ceded are opened to settlement or entry the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in section four of this Act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except sections sixteen and thirty-six, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purpose, shall be subject to withdrawal and disposition under the rec-

lamation Act of June seventeenth, nineteen hundred and two, so far as feasible irrigation projects may be found therein. The charges provided for by said reclamation Act shall be in addition to the charge of four dollars per acre for the land, and shall be paid in annual installments as required under the reclamation Act; and the amounts to be paid for the land shall be credited to the funds herein established for the benefit of the Crow Indians. If any lands in sections sixteen and thirty-six are included in an irrigation project under the reclamation Act, the State of Montana may select in lieu thereof, as herein provided, other lands not included in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon the ceded lands performed directly by the United States under the reclamation Act, preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable. *Provided, however,* That if the lands withdrawn under the reclamation Act are not disposed of within five years after the passage of this Act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this Act. That the lands not withdrawn for irrigation under said reclamation Act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral-land laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon,

occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That as to the lands open under such proclamation the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That the price of said lands shall be four dollars per acre, when entered under the homestead laws, to be paid as follows:

One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year.

In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

Lands entered under the town-site and mineral-land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and cancelled: *Provided,* That the lands embraced within such canceled entry shall, after cancellation of

such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: *And Provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation Act: *And provided further*, That when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned."

Section 6 of the same Article of this Act provides, as follows:

"That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and paid to the Crow Indians or expended on their account only as provided in article two of said agreement as herein amended,

No lands in sections sixteen and thirty-six now occupied, as set forth in article three of the agreement herein ratified, or withdrawn for irrigation under the provisions of said reclamation Act, shall be reserved for school purposes, but the State of Montana shall be entitled to indemnity for any lands so occu-

pied; and the governor of said state, with the approval of the Secretary of the Interior, is hereby authorized in the tract herein ceded to locate other lands not occupied or withdrawn, which shall be paid for by the United States, as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement, but no selection shall be made by the State of the lands herein ceded except to compensate for losses occurring therein."

Section 8 of the same Article of this Act provides as follows:

"That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided."

These lands were opened to settlement and entry by the President's proclamation of May 24, 1906. A considerable portion of the land has been disposed of pursuant to the proclamation referred to, and on the lands undisposed of and for the benefit of the Indians, the Bureau of Indian Affairs assumes to grant exclusive license privileges for a price.

In the first place, when the Act in question was

passed, the title to the land was in the United States. The only right that the Indians had was a possessory right.

Johnson v. McIntosh, 8 Wheat. (21 U. S.) 543;
Spaulding v. Chandler, 160 U. S. 394.

This right of occupancy could be terminated by Act of Congress as well as by treaty or agreement with the Indians.

Beecher v. Wetherby, 95 U. S. 517;
Buttz v. Northern Pacific Ry. Co., 119 U. S. 73;
Lone Wolf v. Hitchcock, 187 U. S. 553.

When this right of occupancy terminated or was abandoned with the approval of the United States, all of the Indian rights were extinguished.

Buttz v. N. P. Ry. Co., *supra*:
United States v. Cook, 19 Wall (86 U. S.) 591.

Notwithstanding these provisions of law as to the cession and disposal of these lands, the Court of Appeals held that the lands were held in trust for the Indians, were reserved lands, and were not public lands available to the public for pasture purposes—in other words, they were still part of the Indian Reservation. It will be noticed that the cession of the land on the part of the Indians to the United States is unqualified and unconditional. Indeed, the manner of the disposal of the land, practically, under all of the land laws of the United States, rendering necessary

its examination by the public, would preclude the idea that the Indian Department should exercise jurisdiction over it. It was clearly the intention, as it seems to us, that every portion of this land should at all times be accessible to the public, so that settlements might be made by those intending to do so under the homestead and other laws, and the leasing of same by the Indian Department necessarily would interfere with this being done. If any trust arose at all, it attached to the money which was to be paid, and not to the land itself. It was said in the case of

United States v. Choctaw Nation, 179 U. S. 494:

"Looking now at the treaty of 1866, we are unable to concur in the interpretation placed upon it by the court of claims. In our opinion its words plainly and obviously import a cession to the United States of the territory constituting the Leased District, unaccompanied by any condition in the nature of a trust, express or implied, except that the *money* to be paid by the United States in consideration of the cession was to be invested and held by the United States 'in trust' for certain specified objects. The declaration of a trust touching the money, and the failure to accompany the cession of the lands with any declaration of a trust in respect to them, manifestly shows that there was an intention to pass to the United States an absolute title to the lands, and to abrogate the existing lease."

We respectfully submit that the learned court

whose conclusions we are now assailing held to the contrary in the case of

Bean et al v. Morris, 159 Fed. 651,

the question arising in connection with an asserted claim to the waters of Sage Creek. It then used the following language:

> "It is also urged that complainant's appropriation was invalid, because at the date of the initiation of his claim the head waters of Sage creek were within the limits of the Crow Reservation in the state of Montana; that the complainant's appropriation conferred no right upon him as against the Indians of that reservation; and that appellants have succeeded to all rights of such Indians by their settlement upon the lands then occupied by such Indians. We think a complete answer to this contention is found in the opinion of the learned judge presiding in the Circuit Court, in which he said:
>
> 'When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public, * * *.'"

On certiorari to this court, in that case, the decision of the Court of Appeals was affirmed.

Bean v. Morris, 221 U. S. 485,

when this court used the following language:

> "Other matters adverted to in argument, so far as not disposed of by what we have said, have been dealt with sufficiently in two courts. It is enough here to say that we are satisfied with their discussion, and confine our own to the only matter that warranted a certiorari or suggested questions that might be grave."

Are we not then justified in saying that this matter has been already under consideration by this court, and a conclusion reached at variance with the Government's contention.

If the lands are still a part of the reservation, it is needless to say they are subject to the laws relating to Indian country. It is also needless to say that when lands are thrown open to exploration and settlement, they are no longer reserved. It has been suggested because the lands were not subject to entry under the Desert Act, they were not public lands in the sense in which that designation is recognized by the courts. So far as we know, no definition of the term "public lands" requires that the lands should be open to entry under all of the general laws relating to public lands. Vacant mineral lands of the United States are public lands, yet lands available for minerals are reserved from sale, except as expressly directed by law, and when known to be valuable for minerals can only be sold under the mining laws.

In

Newhall v. Sanger, 92 U. S. 761,

this court said:

> "The words 'public lands,' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

Justice Van Devanter in the case of

Northern Lumber Co. v. O'Brien, 139 Fed. 614,

said:

> "The words 'public land' have long had a settled meaning in the legisation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws."

See likewise

United States v. Blendaur, 128 Fed. 910;
Jackman v. Atchison T. & S. F. R. Co., 24 N. M. 278.

The intention of the legislation under consideration clearly indicated that the Indians should remove to the diminished reservation, except in the case of those Indians entitled to allotments in severalty in the ceded portion electing to remain there. These allotments in severalty unexchanged didn't continue in existence Indian rights as such. If the land is reserved under the jurisdiction of the Indian Bureau, what is the position of the homesteader or the purchaser from the state? The right of the state to the school sections or to sections acquired in lieu thereof under the provisions of the law attached and became fixed before the land was thrown open to settlement. The state could sell these lands. The land of the homesteader or of the purchaser from the state might be surrounded by lands not yet sold. If so, such person might find access to his land barred by a lessee of the Indian Department, who, under the regula-

tions of the Indian Department, might fence up all of the leased lands. He could not rely on the provisions contained in section 3 of the Act of February 25, 1885, against preventing or obstructing free passage over public lands, for the lands in question would not be public. We submit there can be no middle ground and no intermediate state or condition. These lands are either reservation lands or public lands. They cannot be both. Nor can they be part "Indian" or "reservation" and "part public" or "part free." The statutes which relate to public lands and those which relate to reservation lands are so radically different that they cannot be applied at the same time and in the same district. The confusion that would result from such an attempt would be so great that such a view should not be entertained, unless there are some express statutory provisions from which there is no escape. The only consistent reasonable conclusion is that these lands became public when they were thrown open for settlement, if not before, and such being their character, the injunction was improperly issued.

Buford v. Houtz, 133 U. S. 320.

We quote as follows from the dissenting opinion of Judge Gilbert:

> "It is inconsistent with the purpose of the Act that settlement and exploration shall be barred or embarrassed by lessees of the Bureau of Indian Affairs who are authorized

under the regulations of that Bureau to fence, inclose and improve the leased lands. As against such a lease, if valid, the settler or prospector is powerless to assert a right of access as upon public lands of the United States."

U. S. v. Ash Sheep Co., 221 Fed. 582 (excerpt page 590).

TRUST.

It is argued that these lands are held in trust by the United States for the Indians. If this were correct, it would still be true that they were no longer "reserved" or "reservation" or "Indian" lands. In so far as the public are concerned, they are open to homesteaders; they are open to exploration and location by prospectors. The title of the state to the school sections, as already stated, or to lieu sections has become fixed. These can be sold or leased by the state. It goes without saying, that the homesteader or locator or the purchaser from the state has a right of ingress and egress to and from the land. This right is one not resting on permission granted by an Indian agent or the Indian Department.

Let us see, however, whether the so-called trust affects the land. Will it be contended that Congress intended to limit or modify the title of the United States? The United States was already the owner in fee absolute. All that the Indians ceded was the right of occupancy. Congress might have put an end to this right of occupancy without a

treaty or agreement. Can it be consistently maintained that Congress intended to restrict the title of the United States or to modify it, so as to give the Indians an equitable right in and to the lands themselves? They had no title at all, but merely a right of occupancy.

Beecher v. Wetherby, 95 U. S. 517;
Spaulding v. Chandler, 160 U. S. 394.

It is not the policy of the United States to give Indians any title except upon the breaking up of the tribal relations, and then only in severalty. Are we to assume that Congress intended a reversal of that policy? No reason presents itself justifying that conclusion. We submit that the correct view is that the trust was simply an undertaking to treat the proceeds as trust funds and to act in the matter of the sale as a trustee might act. Such a course cannot properly be held to affect the title of the sovereign or to affect the land at all. Moreover, if we observe the language used, we see that there is no trust "to hold for the Indians" or "to care for" or "to manage" or "to lease" the lands. To all intents and purposes whatever the obligations of the United States to the Indians may be, the lands must be regarded as public lands, for there is no way to distinguish them from such as are unquestionably public lands.

PENALTY.

Section 2117 of the Revised Statutes of the United States reads as follows:

> "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

The trial court held that this statute did not apply to sheep.

United States v. Ash Sheep Co., 229 Fed. 479.

The Court of Appeal held to the contrary.

United States v. Ash Sheep Co., 250 Fed. 592.
Id. 254 Fed. 59.

The statute in question is a penal one, and the rule of strict construction applies. Nothing should be included that fairly does not come within the express provisions of the law. This court has declared in various cases the rule that should apply in the case of penal statutes. We instance the following: No one can be punished for the violation of a statute, unless his case is plainly and unmistakably within its terms.

United States v. Lacher, 134 U. S. 624.

The object of a penal statute is to modify the purpose of the legislative intent; not to furnish scientific definitions, and that intent is usually

to be found in giving to the words the meaning used in ordinary speech.

Sarlls v. United States, 152 U. S. 570.

Penal laws are to be construed strictly. The intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning.

United States v. Harris, 177 U. S 305.

We quote the following from the case of United States v. Harris, *supra.*

> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company.' Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subject to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

The Court of Appeals had in mind these principles when it used the following language in the case of

> Bircher v. United States, 169 Fed. 591:
> "We do not overlook the general rule that the intention of the legislature is to be gathered from the words which they employ, and that while a case may fall within the mischief to be remedied, and in the same class therewith, still, if it be not within the words of the statute, construction will not be permitted to bring it therein."

To the same effect is the doctrine declared in the following cases:

> United States v. Gooding, 12 Wheat. (25 U. S.) 460;
> Greely v. Thompson, 10 How. (51 U. S.) 225;
> Baldwin v. Franks, 120 U. S. 678;
> Tiffany v. Nat'l Bank of Mo., 18 Wall. (85 U. S.) 409.

Surely, no one would contend for a moment, speaking of cattle in ordinary conversation, by any stretch of the imagination, it could be said the speaker had in mind sheep. If the enlarged meaning is given to the term "cattle," it might be pertinent to inquire why mention horses and mules. The mention of these animals, specifically, would indicate a purpose that the enlarged meaning should not be given to the term "cattle" as contended for by the Government. The term "cattle" as generally understood is used in reference to animals of the bovine species.

State ex rel Esser vs. District Court of 5th Judicial District in and for Nye County, 42 Nev. 218, 174 Pac. 1023.

This is true where, in excise laws, custom duties are imposed on hides.

Rossbach v. United States, 116 Fed. 781;
United States v. Schmoll, 154 Fed. 734.

See also decision of trial court in case

United States v. Ash Sheep Co., 229 Fed. 479;
Keys v. United States 2 Okl. Cr. Rep. 647.

As a further aid to construing this law, reference may be made to its genesis and history.

The Supreme Court of the United States in the case of

United States v. Hirsch, 100 U. S. 33,

said that in construing any part of the United States Revised Statutes, it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.

See likewise:

United States v. Bowen, 100 U. S. 508;
The Conqueror, 166 U. S. 110;
United States v. Lacher, *supra.*

Tracing the history of this law, we find it first in the statutes of 1799. Then in force, it read as follows:

> "*And be it further enacted,* That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, * * * shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by

treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months."

(Sec. 2 of Act of 1799, vol. 1, Stat. at Large, page 744).

The subject was next considered by Congress in the year 1834 when the law as it now stands was enacted. (4 Stat. at Large, page 730). In the first act, it will be noticed that horses and cattle were mentioned, in the later act mules were added. If, in this legislation, Congress intended to give to the term "cattle" the extended meaning which the Government insists should be given to it, there was no need for expressly mentioning mules. Indeed, so far as that is concerned, if the contention of the Government is upheld, the mentioning of horses and mules was unnecessary. We insist that there is in the history of this legislation the purpose of the law-making body to give to the terms used a generic limitation.

FORMER ADJUDICATION AND ESTOPPEL.

In the equitable action that was instituted, the Government sought to recover this penalty. It is true that no express mention is made of the fact that the damage demanded was by virtue of the law in question. It is true, nevertheless, that the right to recover the damage under this law was asserted. In the equitable action the Government insisted that, regardless of the damage that was done, the statute fixed the amount of it, and it was entitled to recover one dollar per head. The

trial court decided against it, and that decision stands unappealed from and has in it the element of finality. We submit that the decision in that case, adverse to the United States, as to its right to recover this money, is determinative of its right to do so in the present action.

In the case of

Forsyth v. Hammond, 166 U. S. 506

the Supreme Court of the United States declared that a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions, though the form and causes of action be different.

In the case of

Southern Pacific R. Co. v. United States, 168 U. S. 1,

it was declared that a right to question a fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the said parties and their privies, even if that suit is for a different cause of action. And in the case of

Wabash Gas Light Co. v. District of Columbia, 161 U. S. 316,

it was said that for the purpose of ascertaining the subject matter of a controversy and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined.

In the equitable action, the United States insisted on its right to recover this penalty, as we have already stated. The trial court held against its claim as will be noticed by the decision.

U. S. v. Ash Sheep Co., 229 Fed. 479.

The judgment in that case stands unreversed and is unappealed from and we insist that it stands as a bar against the maintenance and prosecution of the present action.

We submit, likewise, that the United States in demanding damages, as it did in the equitable action, should now be estopped (having recovered damages in that action for the injury done) from maintaining the present action to recover additional damages. This principle we are now contending for finds expression in the case of

Kendall v. Stokes, 3 How. (44 U. S.) 87,

where it is said that where a party having a choice of remedies for a wrong done, selects one, proceeds to judgment and reaps the fruit of his judgment, he cannot afterwards proceed in another suit for the same cause of action.

And Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit in the case of

Union Central Life Ins. Co. v. Drake, 214 Fed. 536,

said:

"When the second suit is upon a different cause of action but between the same parties

as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, * * * *."

In this case, in the equitable action, under the proof adduced for the purpose of showing damages, the Government was unable to show that any damage was done; but the trespass being admitted, nominal damages were awarded. In that action, the Government insisted, regardless of the actual damage, that it was entitled to recover one dollar per head by virtue of the provisions of the statute under consideration. The trial court, rightfully or wrongfully, decided against this contention. Surely, the Government is not at liberty, having permitted the judgment in that case to become final, to relitigate this question. If it felt dissatisfied with the incorrectness of that judgment, it should have appealed. Not having done so, that judgment is final, and the determination of the right to recover this penalty having been passed upon in that action, it cannot now in the present action again assert that right.

We respectfully submit that the judgments in both cases should be reversed, with directions to the lower court to dismiss both actions.

Respectfully submitted,

C. B. NOLAN,

WM. SCALLON,

Solicitors for Plaintiff in Error, and Appellant.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ASH SHEEP COMPANY, APPELLANT,
v.
THE UNITED STATES OF AMERICA. } No. 212.

ASH SHEEP COMPANY, PLAINTIFF IN ERROR,
v.
THE UNITED STATES OF AMERICA. } No. 285.

ON APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The fundamental question involved in both these cases is whether certain lands ceded to the United States by the Crow Indians under an agreement dated August 14, 1899, as modified, amended and ratified by the Act of April 27, 1904, 33 Stat. 352, have become public lands so as to be open to the free grazing of stock.

(a) *History of the litigation.*

The Government first brought a suit in equity to enjoin the Ash Sheep Company, appellant here, from trespassing on these lands with 7100 sheep, and for damages in the sum of $7,100. No. 212 in this court. The District Court dismissed the bill, holding that the lands were public lands. R. 16. The Government appealed, the Circuit Court of Appeals reversed the decree (221 Fed. 582), and by its mandate directed the entry of a decree for injunction "and for such damages as the court may find the complainant entitled to." R. 25. When the case again came up in the District Court, the Government offered no evidence of actual damages, but it is inferable that some effort was made to recover one dollar per head for the trespassing sheep under the statute imposing that penalty for grazing "horses, mules, or cattle" on Indian lands (R. S. § 2117); for the court, in its opinion, construed that statute and held that it did not cover sheep; and that, in any event, equity could not aid in the recovery of penalties. R. 31. A decree was therefore entered for injunction and one dollar damages. The Company appealed and the Circuit Court of Appeals, adhering to its former decision, affirmed the decree. R. 49. The Company then brought the case to this court.

The Government took no appeal from the second decree in the equity suit, but instead brought an action at law to recover the penalties imposed by the statute. No. 285 in this court. In this action the District Court adhered to its former construc-

tion of the penal statute (R. 38) and gave judgment for defendant. R. 39. The Government took the case up, secured a reversal (250 Fed. 592), and later recovered a judgment in the District Court for $5,000, it being stipulated that 5000 sheep had been grazed on the lands involved.

The Company in turn took the case to the Circuit Court of Appeals, where the judgment was affirmed (R. 69), and then brought it to this court by writ of error.

(*b*) *The Agreement of Cession and the Act modifying, amending and ratifying the same.*

By Article I of an agreement made August 14, 1899, between Commissioners representing the United States and the Crow tribe of Indians, the latter ceded to the United States "all right, title and interest which they may have to the lands embraced within" certain described boundaries. These lands were a part of the Crow Indian Reservation in Montana, and now include the lands in respect to which the present controversy arises. Article II of this agreement reads in part as follows:

> That in consideration of the land ceded, granted and relinquished, as aforesaid, the United States stipulates and agrees to pay to and expend for the Indians of the said reservation eleven hundred and fifty thousand dollars, in the following manner, to wit:

Then followed numerous provisions as to the times, manner and method of making the expenditures and payments, for the benefit of the Indians, none of which concerns us here.

The transaction contemplated by this agreement was a complete cession of lands for a money consideration to be paid by the United States, and if ratified and carried out would have resulted in a complete extinguishment of the Indian right and title.

The agreement as made, however, was never ratified. On the contrary, nearly four years later and on April 27, 1904, Congress passed an Act (33 Stat. 352, 356) which, after reciting the agreement in full, enacted "That said agreement be, and the same is hereby, modified and amended to read as follows:"

As to Article I there was no change in language. It was merely re-enacted with its terms of absolute cession and relinquishment. The first paragraph of Article II, however, was amended to read as follows:

> Art. II. That in consideration of the land ceded, granted, relinquished, and conveyed by article one of this agreement the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the reclamation Act approved June seventeenth, nineteen hundred and two, the homestead, town-site, and mineral land laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, at not less than four dollars per acre, subject to the provisions in section five, the United States to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, at one dollar and twenty-five cents per acre, and to pay the said Indians the proceeds derived from the sale of said lands, and for

> the said sections sixteen and thirty-six, or an equivalent of two sections in each township, as follows:

The remaining paragraphs of Article II directed in detail the application of the moneys to be received from the sales of the lands, substantially as provided in the original agreement. The final paragraph, however, concludes as follows:

> And the various expenditures and payments required to be made under the provisions of this article shall be made as the funds therefor are available as herein provided, and shall be pro-rated, apportioned, and made in such proportions and amounts as in the opinion of the Secretary of the Interior the needs and requirements of the Indians and their best interests shall warrant and demand.

By Article III, both of the original and amended agreement, parcels of land in the ceded tract already allotted in severalty were to be reserved for the allottees if they so desired, and allotments were also to be made to Indians having homes upon tracts which they desired to retain. Those desiring to relinquish their allotments or homes were allowed to do so and provision was made for the sale of their improvements.

No changes of special significance here were made in the other articles of the original agreement.

The modified and amended agreement having been set forth in Section 1 of the Act, Section 2 provided:

> That the said agreement be, and the same is hereby, accepted, ratified, and confirmed, as herein amended.

Section 3 appropriated a sum of money from the Treasury for surveying and marking "so much of the boundary line of the tract ceded and relinquished by the Indians as may be necessary to segregate the same from the lands reserved by them," and also a further sum "for the completion of the survey and subdivision of said ceded lands, the same to be reimbursed out of the first moneys to be received from the sale of said lands."

Section 4 gave specific directions for the making of further allotments in the ceded tract, the preparation of a schedule of occupants who should elect to relinquish their improvements and remove to the diminished reservation; and for the appraisal and sale of the improvements.

Section 5 reads as follows:

> SEC. 5. That before any of the lands by this agreement ceded are opened to settlement or entry the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in section four of this Act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except sections sixteen and thirty-six, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purpose, shall be subject to withdrawal and disposition under the reclamation Act of June

seventeenth, nineteen hundred and two, so far as feasible irrigation projects may be found therein. The charges provided for by said reclamation Act shall be in addition to the charge of four dollars per acre for the land, and shall be paid in annual installments as required under the reclamation Act; and the amounts to be paid for the land shall be credited to the funds herein established for the benefit of the Crow Indians. If any lands in sections sixteen and thirty-six are included in an irrigation project under the reclamation Act, the State of Montana may select in lieu thereof, as herein provided, other lands not included in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon the ceded lands, performed directly by the United States under the reclamation Act, preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable: *Provided, however,* That if the lands withdrawn under the reclamation Act are not disposed of within five years after the passage of this Act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this Act. That the lands not withdrawn for irrigation under said reclamation Act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral-land laws of the United States, and shall be opened to settlement and entry

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by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That as to the lands open under such proclamation the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish war or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *And provided further*, That the price of said lands shall be four dollars per acre, when entered under the homestead laws, to be paid as follows:

One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year.

In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

Lands entered under the town-site and mineral-land laws shall be paid for in amount and manner as provided by said laws, but in

no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled: *Provided*, That the lands embraced within such canceled entry shall, after cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation Act: *And provided further*, That when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned.

Section 6 provides that "the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and paid to the Crow Indians" only in conformity with Article II of the amended agreement.

That Section also makes certain arrangements as to the school sections granted to Montana.

Section 7 appropriates $90,000 from the Treasury to pay for the school sections.

Section 8, being the final section of the Act, reads as follows:

> That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

(c) *Action of the Interior Department.*

Until recent years the Department of the Interior seems to have taken no action for the purpose of securing for the Indians an income from the grazing of unsold ceded lands such as those here involved. In 1911, however, the possibilities in this direction and the matter of taking the requisite measures were submitted to the Secretary by the Bureau of Indian

Affairs, and on November 27 of that year he rendered a decision, addressed to the Commissioner of Indian Affairs, reading in part as follows:

> You have submitted the question of jurisdiction over lands within Indian reservations after they have been opened to settlement and entry.
>
> The question is perhaps not one so much of jurisdiction as one involving the rights of the Indians to the use and benefit of the lands after provision has been made extinguishing the Indian claim and making disposition of the lands. You note that such lands may be divided generally into two classes: (1) Those which the United States has purchased from the Indians and paid for, the Indian claim thereto having been completely extinguished; and (2) those which the United States agrees to dispose of for the benefit of the Indians, without, however, becoming bound to purchase the lands, whereby the claim of the Indians remains unextinguished until the lands are finally sold.
>
> The department agrees with you that as to the first class the Indians have no further concern and that after the cession such lands are properly under the jurisdiction of the General Land Office.
>
> The department also agrees with you that the Indians are rightfully entitled to the use and benefit of the lands coming within the second class until they shall have been finally disposed of, with the condition, however, that the use thereof shall in nowise interfere with

the speedy sale or other disposition provided by law.

This decision with the grazing regulations based thereon was promulgated by a circular dated July 25, 1912, which is reprinted in full as an appendix to this brief, p. 1.

This action was referred to in the official report of the Commissioner of Indian Affairs for the year 1912, page 51. That report reads in part as follows:

> Under various acts passed by Congress within recent years certain lands ceded by the Indians to the United States are open to settlement and entry, and the Government endeavors to dispose of them at their appraised value for the benefit of the Indians.
>
> Nearly all of such acts contain a clause practically identical with the following:
>
> "That nothing in this act shall in any manner bind the United States to purchase any portion of the lands herein described, * * * or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided."
>
> It has been the practice to consider such lands under the jurisdiction and supervision of the General Land Office from the passage of the act, and the Indians' title thereto extinguished. On this theory the public at large has come to consider said lands a part

of the public domain, and the lands have therefore been used indiscriminately by various interests, principally for grazing purposes, without compensation to the Indians.

By departmental decision of November 27, 1911, it was held in effect that the Indians' title to such lands is not extinguished until date of entry, settlement, or sale, and the Indians are entitled to their use, or to any revenue that may be derived from their use by others, pending date of settlement, sale, or entry.

Following this decision the matter was considered jointly by representatives of this office and the General Land Office, and a set of regulations has been drafted to provide for proper concurrent jurisdiction and the collection, for the benefit of the Indians, of grazing fees from the users of the lands pending actual settlement, entry, or sale.

It is believed that the regulations when put into effect upon the various reservations where applicable will be the means of securing to the Indians large sums of money which heretofore have been lost to them, without interfering with the speedy sale or other disposition of the lands as provided by Congress

ARGUMENT.

I.

By the Act of Congress of April 27, 1904, the unqualified sale and cession provided for by the Agreement, was converted into a cession and relinquishment in trust to sell and dispose of the lands for the benefit of the Indians and pay over to them the proceeds. The entire beneficial interest remained in the tribe and the lands themselves remained Indian lands until disposed of under the trust.

(*a*) Looking at the Act as a whole, and confining our attention for the time being solely to the nature of the transaction as between the Indians and the United States, it seems almost too clear for argument that in its essence and legal character this was a cession of lands in trust for purposes of sale and disposal by the trustee for the benefit of the grantors.

It is true that the first article of the agreement as ratified is in terms a complete and unqualified relinquishment of the Indian title. In this article no trust is indicated and no consideration expressed. But the second article expresses the consideration and clearly indicates the creation of the trust. The consideration is that the United States "agrees to dispose of" the ceded lands "as hereinafter provided"; and the provisions then made recognize a duty to realize for the Indians the full value of their lands, by fixing minimum prices, far above the regular prices of public lands, and directing that these minimum prices shall be maintained until such time as, in the judgment of the President himself, no more can be

sold at such prices, after which the President may modify the prices and change the manner and conditions of the sales as he may deem best. The United States agrees to advance money for the survey and subdivision of the ceded lands, preparatory to their disposal; but these advances are to be reimbursed out of the first moneys received from the sales. Following the provision of Article II for paying the expenses of the Indian Chiefs at Washington occurs this language:

> *Provided further*, That should the funds accruing to the Indians from the sale of *their lands* render it advisable, the Secretary of the Interior may, etc.

These provisions and this language are inconsistent with any other theory than that of a trust in the lands themselves. They recognize that the full beneficial interest is in the Indians and that the lands remain Indian lands.

Finally, to put the matter beyond all controversy, the eighth and last section of the Act of Congress declares:

> That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described * * * [except the school sections], or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the pro-

> ceeds received from the sale thereof only as received, as herein provided.

As was said by the Circuit Court of Appeals, "It is difficult to perceive how the purpose of Congress in the matter could have been more plainly stated." 221 Fed. 582, 586. Indeed, it is difficult to perceive how this language can be less effective to create a trust in the lands themselves, than was the language of the treaty under consideration in *Frost* v. *Wenie*, 157 U. S. 46, 50, namely:

> Which land is to be held in trust for said Indians, and to be surveyed and sold for their benefit under the direction of the Commissioner of the General Land Office, at a price not less than one dollar and twenty-five cents per acre as other lands are surveyed and sold, * * * .

The lands there involved were afterwards included with others in a military reservation, which was later abandoned, whereupon, Congress, by the Act of December 15, 1880, 21 Stat. 311, directed that a part of the military lands be opened for entry under the homestead laws. The tract described in this Act included the ceded lands, but this court said:

> Looking at that act, in connection with prior statutes, particularly that of May 28, 1880, we are of opinion that the lands which the act of December 15, 1880, directed to be opened for entry under the homestead laws, were public lands that were within the abandoned military reservation, and subject to disposition under general laws relating to

"other public lands," and not lands of an exceptional class that were affected with a trust established for the benefit of Indians by treaty.

Can there be any doubt that, under the terms of the Crow cession, any moneys recovered as civil damages for timber or fire trespass upon the ceded lands, would equitably belong to the Indians and not to the United States? And can there be any greater doubt as to funds actually received for any other natural product of the land, such as grass removed by means of grazing animals?

The Secretary of the Interior had no doubt on this subject as appears from his decision of November 27, 1911, and the grazing regulations based thereon; and he is the officer charged by law with the exercise of the functions of governmental guardianship over the Indians; and upon him also devolves the duty of carrying out the specific trusts created by this act of cession.

In the action at law the Company, by its first affirmative defense alleges that it had purchased and leased from private parties various scattered tracts within the boundaries described in the complaint, as to which the Government and Indian titles had already been divested; and that in driving its sheep back and forth to these lands they necessarily were driven over and grazed upon the unsold ceded lands.

It thus seeks to bring the case within *Buford* v. *Houtz*, 133 U. S. 320. But in that case the unsold even sections were unreserved public lands, un-

doubtedly open to free grazing, while here, as we have seen, the unsold lands are Indian lands, upon which it is unlawful to drive or graze sheep. The burden is therefore upon the Company, if it desires to graze its own lands, to so utilize them as to avoid transgressing the statute. If there was any real difficulty in this respect, there is every presumption that upon application to the proper officials of the Interior Department, amicable arrangements could have been made for driveways to and from the defendant's own pasture lands.

(b) The Ash Sheep Company is of course a mere stranger to the agreement between the Indians and the Government. It does not attempt to connect itself in any way with either the equitable rights of the Indians or the legal title held by the Government. But, pointing to the unqualified language of cession in the first article of the agreement and to the provisions in the second section for selling the lands "under the provisions of the" reclamation, homestead, townsite, and mineral land laws, it asserts that the lands are public lands and subject to free grazing like other public lands. It relies mainly on *Newhall* v. *Sanger*, 92 U. S. 761, 763, and certain other cases in which this court said that: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." This is a carefully guarded expression. The words "habitually used" imply that there are or may be other uses than the habitual one. This was recognized in *Union Pacific*

R. R. Co. v. *Harris*, 215 U. S. 386, 388, where it was said:

> As stated in *Newhall* v. *Sanger* (92 U. S. 761, 763): "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." See also *Barker* v. *Harvey*, 181 U. S. 481, 490; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 391. *If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation.* (Italics ours.)

It is not to be supposed that this court by a general expression (though often repeated) relating to two words used in our legislation, meant to supersede or preclude the application of the fundamental rule that in cases of doubt the whole of a statute and all its provisions are to be considered in order to ascertain the intention of the legislature.

Accordingly, we find the Circuit Court of Appeals for the Ninth Circuit, in *United States* v. *Blendaur*, 128 Fed. 910, 913; saying:

> The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In *United States* v. *Bisel*, 8

Mont. 20, 30, 19 Pac. 251, the court, after referring to the decisions in *Wilcox* v. *Jackson*, *Newhall* v. *Sanger*, and other cases, said:

"There is no statutory definition of the words 'public lands,' and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use."

The case of *Minnesota* v. *Hitchcock*, 185 U. S. 373, is peculiarly applicable here. It involved lands ceded by the Chippewa Indians in accordance with an Act of Congress which prescribed in advance all the terms and conditions of the cession; and the assent of the Indians thereto was subsequently procured. Act of January 14, 1889, 25 Stat. 642. This Act provided for "the complete cession and relinquishment in writing of all their title and interest in and to" the lands described "for the purposes and upon the terms hereinafter stated." Sec. 1. The ceded lands were to be divided into "pine lands" and "agricultural lands," the former to be appraised and sold at auction for cash and the latter to be "disposed of by the United States to actual settlers only under the provisions of the homestead law," for one dollar and twenty-five cents per acre payable in installments. Sec. 6. The proceeds of the sales of both kinds of land were to be paid over to the Indians or applied to their benefit. Unlike the legislation now involved, the Act contained no express declaration of trust.

The State of Minnesota, claiming Sections 16 and 36 of the ceded lands as school lands, brought an original suit in this court to enjoin the Secretary of

the Interior from selling them. This court, discussing the preliminary question of its jurisdiction, held that the United States was the real party to be affected by the decree, and therefore the real defendant. It then said (p. 387):

> But, it may be said, that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians there might be substantial force in this suggestion. But Congress has, for the Government, assumed a personal responsibility.

This "personal responsibility," as the court then pointed out, is assumed by the Act of March 2, 1901, 31 Stat. 950, declaring that, in suits by States to determine their rights to school sections in Indian ceded lands, where an Indian tribe claims a right or interest therein, it is sufficient to make the Secretary of the Interior a party, without joining the tribe; and that the Attorney General, on the request of the Secretary, shall represent and defend "the right or interest of the Indian tribe."

Passing to the main question, the court then held that the ceded lands never became "public lands," and consequently the school grant never attached, saying (p. 394):

> The cession was not to the United States absolutely, but in trust.

And again (p. 398):

> Before any survey of the lands, before the state right had attached to any particular sections, the United States made a treaty or agreement with the Indians, by which they accepted a cession of the entire tract under a trust for its disposition in a particular way.

This same Act of 1889 was again construed in the same way in respect to ceded lands of another reservation, and damages were awarded to the Indians for a breach of the trust by the United States. *United States* v. *Mille Lac Chippewas*, 229 U. S. 498.

In the *Blendaur* case heretofore cited (128 Fed. 910) the lands involved were included in a large tract ceded absolutely for a money consideration to be paid by the Government, but were temporarily reserved for a possible permanent reservation site in case it should prove more suitable than the reservation to which the Indians first removed. It was never used, however, as a reservation, but was afterwards so dealt with by Congress as to recognize some remaining right to it in the Indians. Afterwards, Congress directed that the lands be sold to actual settlers for one dollar and twenty-five cents per acre, expressly excluding the homestead law, and provided that the first $50,000 realized should be paid the Indians in installments. Later still, the benefits of the homestead law were extended to the settlers. And finally, Congress substituted direct appropriations from the Treasury for the remaining payments out of receipts from sales. The court held that upon this latter action the lands became public lands and

subject to reservation as such for National Forest purposes. It did not base its decision on the fact that the homestead laws had been extended to the lands, as erroneously indicated by the syllabus.

In the present case, as we have shown, the whole beneficial interest remained in the Indians. While the sales were in terms to be made "under" certain general laws, they were not to be made under all the provisions of any of those laws. The prices specifically fixed were higher, the times and methods of payment were different, and those laws and the machinery provided by them were only to be employed until, in the judgment of the President, no more lands could be sold for those prices. When that time came, he was authorized to sell them without any reference whatever to any of the general land laws, the language being: "at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned."

In short, the scheme adopted is manifestly merely one of convenience and general conformity whereby the existing machinery and methods of certain land laws are to be utilized to effect sales of the Indian lands so long as certain prices can be realized, after which, that machinery and those methods are to be discarded entirely, at the President's discretion, for any others that he thinks will better serve the purpose. In simple truth, none of these lands were ever subject to sale or disposal "under general laws" in their entirety.

Moreover, it is to be noted that the words "public lands" are nowhere "used" in this "legislation." On the contrary, as before pointed out, the lands involved, when not specifically described or referred to as ceded lands, are described as "their lands;" i. e., the lands of the Indians. The proposition here necessarily relied on by the Company is the converse of that laid down by this court. It is, in effect, that lands subject to sale or disposal under general laws are "public lands." But this, of course, cannot be universally true. Indian lands held in trust by the Government for purposes of sale and an accounting cannot become public property merely because of the method adopted to effectuate the sales.

But it seems useless to pursue the matter further. The terms of the Act of cession here involved indicate much more clearly a trust in the lands themselves than did the Act construed in *Minnesota* v. *Hitchcock* and *United States* v. *Mille Lac Chippewas*, *supra*. Under both Acts a part of the lands were to be sold in accordance with the general scheme of the homestead laws, and those decisions furnish the law for these cases.

The case of *United States* v. *Choctaw Nation*, 179 U. S. 494, which is cited by counsel in support of the contention that the trust here established is confined to the moneys derived from the sales of land (Brief, p. 18), is wholly inapplicable. The lands there involved were ceded absolutely for the lump sum of $300,000, paid by the United States, but to be held in trust until certain conditions relating

to the freeing of slaves, etc., were complied with by the Indian tribes. See page 527, where Article 8 of the treaty is set out in full by the court.

(c) The suggestion is made that the lands here involved were held to be "public lands" by the Circuit Court of Appeals in *Bean* v. *Morris*, 159 Fed. 651, and that its finding was adopted by this court in *Bean* v. *Morris*, 221 U. S. 485. Appellant's Brief, pp. 18–19. This contention is based on an error of fact, which is only the less remarkable because it was shared by Judge Gilbert and made, in part, the basis of his dissenting opinion on the first appeal in the equity case now before this court. See 221 Fed. 582, 589.

Sage Creek, whose waters were the subject of litigation in *Bean* v. *Morris*, is a small stream rising in the southern part of Montana, some distance west of the Bighorn River and flowing southeastward across the State line and discharging its waters into the Shoshone. It is clear, therefore, that the lands embracing the headwaters of Sage Creek are different lands from those involved in these suits. In fact, they were lands ceded by the Crows by a different and earlier agreement, namely, that of December 8, 1890, which was ratified by the Act of March 3, 1891, 26 Stat. 989, 1040–1041. Those lands were ceded absolutely for the gross sum of $946,000, appropriated from the Treasury of the United States, and they of course became public lands. The lands involved in the two cases now before this court lie far to the north, on a different watershed, and are

separated from the headwaters of Sage Creek by the whole breadth of the present diminished Crow Reservation.

II.

Sheep are included in Rev. St. Section 2117, which imposes a penalty of one dollar per head for grazing "any stock of horses, mules or cattle," upon Indian lands without the consent of the tribe.

That Section reads as follows:

> Every person who drives or otherwise conveys any stock of horses, mules or cattle, to range and feed on any land belonging to any Indian or Indian Tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

The question turns, of course, on the meaning to be given to "cattle" as here used. It is common knowledge that the word was formerly of a very broad and general signification but has been gradually narrowed with the passage of time. The Standard Dictionary, 20th Century Edition, quotes Trenche's Glossary as follows:

> In the time of Chaucer and Wiclif *catel* was still used in the sense of wealth, substance generally, whereas now its equivalent *cattle* is only used to express property in living animals, the form chattel being reserved for non-living personal property.

The Standard also reproduces the following:

> For every beast of the forest is mine, and the cattle upon a thousand hills. *Ps.* 1, 10.

> He throws down the reins * * * and abandons the cattle to the care of the hostler. Irving Sketch-book, Stage Coach, p. 234.

The present day definition as given by the same dictionary is:

> Domesticated bovine animals, as oxen, cows, bulls, and calves; also, though seldom now as compared with former times, any live stock kept for use or profit, as horses, camels, sheep, goats, swine, etc.

Webster's New International Dictionary defines cattle thus:

> Collectively, live animals held as property or raised for some use, now usually confined to quadrupeds of the bovine family, but sometimes including all domestic quadrupeds, as sheep, goats, horses, mules, asses and swine.

The first provision against the grazing of Indian lands appeared in the Trade and Intercourse Act of May 19, 1796, 1 Stat. 469, 470, Sec. 2. The words there used were simply "horses or cattle." The same words were retained in the like Act of March 30, 1802, 2 Stat. 139, 141, Sec. 2.

By the Act of June 30, 1834, 4 Stat. 729, the law relating to trade and intercourse with the Indians was entirely recast, many new provisions were added, and some of the old ones omitted. There were many changes of language; and the particular provision here involved was separated from other matter occurring with it in Section 2 of the Act of 1802, and made a separate Section—Sec. 9. Several changes were made in the language, the word "mules"

was inserted in its present connection, and the penalty was changed from a lump sum fine of $100 or imprisonment not exceeding six months to the present penalty of one dollar per head of trespassing animals.

Looking for the moment to the word alone, it is not at all unreasonable to assume, in view of the gradual nature of the change in popular use, that "cattle" was consciously employed in the legislation of 1796 and even in that of 1834 in its older and broader sense. The language of legislation like that of the more purely literary and scientific works tends to lag behind the changes taking place in the popular use of words. Especially was this true at a time when learning and the forms in which it was expressed were held in higher regard than at present.

The very question here involved was passed upon by Judge Deady in *United States* v. *Mattock*, 2 Sawyer, 148. After setting forth the older and more recent definitions and referring to the applicable rules of construction, he, like the Circuit Court of Appeals in the present case, had no difficulty in construing *cattle* to include sheep. Among other things, he said:

> The duty of the court, in construing this act, is to give effect to the intention of Congress in enacting it; and this intention must be ascertained as well from the mischief which the act was intended to remedy as the words thereof. Smith's Com., § 703.
>
> The mischief to be prevented or remedied by it was the depasturing of the Indian lands by the stock of white persons. Sheep are as

> much within the reason of the enactment as horses or mules. It can hardly be presumed that Congress intended to impose a penalty upon persons for feeding horses upon the Indian range, and at the same time permit them to cover it with sheep with impunity.

In *Henderson* v. *The Wabash, St. L. & Pac. Ry. Co.*, 81 Mo. 605, the Supreme Court of Missouri construed a statute requiring railroad companies to fence their rights of way, establish cattle guards, etc., and until these things were done making them liable in double damages for destruction or injury to "horses, cattle, mules or other animals." The court held that this language included hogs, saying, among other things (p. 608):

> Even though the statute be regarded as penal in form, the main object and scope of it is not changed on that account. Unquestionably, the legislature intended to furnish to the owners of farm stock, and to the passengers and employes on railroads a protection against loss and injury which did not exist at common law. Swine and sheep were as liable to loss and injury, and as liable to be the cause of accidents to railroad trains as horses and oxen. The mischief to be remedied embraced them equally with other farm stock and no reason is apparent why they should have been excluded from the provisions of the act. * * * The intent of the act is carried out by either attributing to the word "cattle" its more comprehensive and general meaning which would include swine, or by construing the words "other animals"

> to include all other domestic quadrupeds liable to injury by railroad trains.

See also *Davis* v. *Collier*, 13 Ga. 485, where the court held that "horses and cattle" in a sheriff's return included mules and sheep.

This court has often approved and applied the rule relied upon by Judge Deady and the Supreme Court of Missouri in the foregoing quotations. Thus, in *United States* v. *Freeman*, 3 How. 556, it held that "Officers of the Army" included officers of the Marine Corps. In *United States* v. *Hartwell*, 6 Wall. 385, it decided that the words "public officer" included a mere clerk employed in the office of the Assistant Treasurer of the United States at Boston. In *United States* v. *Morris*, 14 Pet. 474, it held that the expression "a vessel of the United States employed and made use of in the transportation of slaves" covered a vessel captured on her way to procure slaves though no slaves had been received on board, or transported by her. And in *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 13, it held that "any car used in moving interstate traffic" includes a locomotive so used.

In *United States* v. *Freeman*, 3 How. 565, after citing *Wimbish* v. *Tailbois*, Plowd. 38, 57, and *Zouch* v. *Stowell*, Plowd. 353, 366, this court said:

> These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the

> end in view, or the purpose which was designed—the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason. This court has repeatedly, in effect, acted upon the rule, and there may be found, in the reports of its decisions, cases under it, like the cases which have been cited from the reports of the English courts.

And in the *Hartwell* case, 6 Wall. 396, it was said:

> The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

So, in *United States* v. *Lacher*, 134 U. S. 624, 628, this court, construing the statute to punish embezzlement, said:

> "It appears to me," said Mr. Justice Story, in *United States* v. *Winn*, 3 Sumner, 209, 211, "that the proper course, in all these cases, is, to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the

context, and promotes in the fullest manner the apparent policy and objects of the legislature."

To the same effect is the statement of Mr. Sedgwick, in his work on Statutory and Constitutional Law, 2d ed. 282: "The rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope."

This passage is quoted by Baron Bramwell in *Attorney General* v. *Sillem*, 2 H. & C. 532, as one "in which good sense, force and propriety of language are equally conspicuous; and which is amply borne out by the authorities, English and American, which he cites." *Foley* v. *Fletcher*, 28 L. J. (N. S.) Ex. 100, 106; *Nicholson* v. *Fields*, 31 L. J. (N. S.) Ex. 233; Hardcastle on Statutory Law, p. 251.

It is useless to multiply authorities. This is not even a case of a thing within the intention but not within the "letter." It is a case of whether the letter—the word—should be understood in its recent and narrower sense, or in the older and broader one, which was still in use by good authori-

ties at the time the Act was passed; and all the considerations derived from the policy of the legislation and the mischiefs to be remedied, which have led the courts to adopt extended meanings, are here present in full force.

The fact that if "cattle" is taken in its extended sense, both "horses," occurring in the original statute, and "mules," inserted in the revision of 1834, are unnecessary, is not of great significance. If legislative bodies were always logical and exact in their choice of language, there would be no need of rules of construction.

In the Missouri case above cited, the court said (p. 608):

> The fact that the construction approved by us either imputes to our law-makers the rhetorical offense of redundancy in employing the words "horses and mules," an offense by the way quite common to literary authors in our language, or attributes to the word "other" a broader meaning than usually conceded to it by the technical rules of interpretation, is a trifling objection when compared with the alternative one of greatly abridging the manifest scope and benefits of the act.

Moreover, the inference from redundancy may be met with another of the same character and of equal strength—or weakness; namely, that if Congress intended only *bovine cattle*, it would have said so plainly in those words or some equivalent expression.

As was pointed out by Judge Deady in the *Mattock* case, *supra*, this is not a case for the application of the rule of *ejusdem generis*. As he well said, there might be some reason for applying that rule if the statute read "horses, mules or other cattle," whereas "cattle" actually occurs as "an independent and particular enumeration of a class of subjects."

Nor is it of importance that, at the date of the Act, sheep were not pastured in the vicinity of Indian Reservations—if, indeed, that be the fact. The court below cites *State* v. *Cleveland*, 83 Ohio St. 61, to the proposition that a statute may include cases not originally contemplated when it deals with a genus within which a new species is brought. It was there held that a statute making it unlawful to throw a stone at a railroad car, includes an interurban traction railway car, though such cars were unknown at the date of the statute. And this court, in one of its historic decisions, dealing with facts and conditions not remotely forecast by anything existing in 1787–89, found it not very difficult to disregard its own former expressions and apply the "admiralty and maritime" jurisdiction—words all saturated with the brine of the salt seas—to fresh water rivers and lakes a thousand miles from the ebb and flow of the tides; *The Genesee Chief*, 12 How. 443; and now, almost daily, it enforces statutes regulating interstate commerce and instrumentalities of commerce of kinds not dreamed of when the Constitution was adopted.

III.

The decree in the equity suit, though it awarded one dollar as damages, did not bar the action at law to recover penalties.

The two suits were totally different in character and in the rights on which they were founded. The former was in equity and demanded civil damages as incidental to the main purpose of injunction. The latter was an action at law to recover penalties for violation of a criminal statute.

The one was founded upon the beneficial ownership of the Indians in the forage growing upon their lands; the other on the right of the sovereign to penalties imposed by Congress for an offense against its laws.

It is true the parties were the same; but in the one case the United States sued in its capacity as guardian and trustee of the Indians; in the other, it sued in its sovereign capacity in its own right, and, we may add, for its own pecuniary benefit, for we have been unable to find that there is any warrant of law for paying to the Indians any penalties recovered under this statute.

The issues as made by the bill did not raise any question of penalties. The allegation was that complainant and the Crow Indians "are being deprived of the benefit of the said lands and premises" and have "sustained damages." There is no mention of penalties or of this penal statute or of any statute whatever. The only indication of reliance upon any statute was that the amount of damage alleged and the amount demanded were equal to one dollar per

head for the sheep alleged to have been pastured on the lands, and this corresponded with the amount of the penalties prescribed by Section 2117 of the Revised Statutes. But this correspondence was not apparent on the face of the bill and cannot alter the character given it by the allegations and prayer actually contained therein.

The first hearing in the District Court was upon a motion to vacate the temporary restraining order, and no question or claim of damages or penalties was then before it. The court held that the lands were public lands, and later, without further hearing, dismissed the bill. R. 212, pp. 15–24. On the first appeal the Circuit Court of Appeals, therefore, had before it no claim or proof of damages or penalties. It reversed the decree solely on the status of the lands, and in its mandate directed the entry of a decree "for the injunction prayed for and for such *damages* as the court may find the complainant entitled to."

When the case again came up in the District Court, the attorneys for the Government, not being prepared with any proof of actual damage, set up in argument, as appears from the opinion (R. 31), a claim for penalties under the statute. This was the first appearance in the case of the matter of penalties, and was, as we have shown, wholly outside the scope of the bill and of the mandate; and was a form of relief entirely beyond the jurisdiction of a court of equity. The court gave the lack of equity jurisdiction as one of the grounds for rejecting the claim; and that was a wholly sufficient reason.

By its decree it awarded the injunction in obedience to the mandate and, the trespass being admitted, gave judgment for nominal "damages."

As was said by the court below (250 Fed. 593, 595):

> A judgment is not conclusive on any question which from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered.

This rule is laid down in practically the same language in 2 Black on Judgments, Section 618, and 23 Cyc. 1317. It is merely the converse of the rule stating when and in what respects judgments *are* conclusive, and both authors give numerous specific instances illustrating its application.

There are at least three distinct reasons why the question of penalties could not have been adjudicated in the equity suit:

(*a*) This court, in *Marshall* v. *Vicksburg*, 15 Wall. 146, 149, said:

> Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either. [NOTE. *Livingston* v. *Tompkins*, 4 Johns. Ch. 415; 2 Story's Equity, Sec. 1319.]

This rule is, of course, fundamental; but there was an additional obstacle to an adjudication upon the question of penalties. In the same chapter containing Section 2117 there is also this further peremptory provision:

> SEC. 2124. All penalties which shall accrue under this title *shall be sued for and recovered in an action in the nature of an action of debt*,

> in the name of the United States * * *, the one half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use. (Italics ours.)

Whether or not this Section precludes the recovery of the penalties by criminal proceedings, it certainly lends no support to the idea that penalties can be recovered in equity. The fact that the remedy prescribed is a civil suit does not prevent Section 2117 from being a criminal statute.

In *United States* v. *Stevenson*, 215 U. S. 190, this court held that the provision in the Alien Contract labor law (Act of March 2, 1907, 34 Stat. 1246), authorizing the recovery of the penalties by civil suits, did not deprive the statute of its criminal character, or preclude the remedy by indictment or criminal information. And in *Lees* v. *United States*, 150 U. S. 476, which was an action to recover the penalties, it was held that, because of the essentially criminal character of the suit, the defendant could not be compelled to testify against himself. To the same effect was *Boyd* v. *United States*, 116 U. S. 616.

Thus, if it were possible to adopt the view taken by opposing counsel, that penalties were sued for in the equity suit here under consideration, we would then have a suit in equity, of which it must be said, to use the language of this court in the *Lees* case, *supra*, (p. 480) that:

> This, though an action civil in form, is unquestionably criminal in its nature.

A suit in equity, criminal in its nature, is of course inconceivable, except as that characterization might be applied to proceedings to punish for contempt for violation of an injunction or other order of the court.

(b) As we have seen, the case presented by the pleadings was solely one of civil damages for trespass. Penalties were wholly outside the issues. In *Fifield* v. *Edwards*, 39 Mich. 264, 266, the court said:

> There can be no bar if the demand to which, by their evidence, the parties directed the attention of the court, and which the court rejected, was not within the issue and consequently could not have been allowed. The estoppel does not depend upon technicalities, but rests in broad principles of justice, and it can apply only when the party has had his day in court and an opportunity to establish his claim. The fact that a suit has been instituted and evidence produced is of no importance whatever, if in fact the evidence was directed to matters which were foreign to the issue. If, for example, the plaintiff in an action of assumpsit were to attempt to litigate a matter of trespass to lands, it would be immaterial how far he should go into the evidence, or at what stage of the proceedings the ruling should be made rejecting his claim; the bar cannot attach, because in law, whatever may have been the testimony, there could have been no recovery.

(c) The parties were the same but, as we have shown, the United States sued in entirely different capacities.

> A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is in contemplation of law a distinct person and a stranger to the prior proceedings and judgment.
>
> *Rathbone* v. *Hooney*, 58 N. Y. 463, 467.

Thus one who, being sued as an individual, disclaims any interest in the property, is not estopped by the judgment from claiming the same property in the capacity of trustee for others. *Sonnenberg* v. *Steinbach*, 9 S. D. 518. See also *Allison* v. *Little*, 93 Ala. 150; *Landon* v. *Townshend*, 112 N. Y. 93, and 129 N. Y. 166.

It thus appears that the claim made in argument for penalties and the expression of views thereon by the court were wholly outside the scope of the issues made by the pleadings and prescribed by the mandate, and beyond the jurisdiction of the court sitting in equity to consider; and were, in truth, mere nullities which bound no one and estopped no one.

CONCLUSION.

The decree in the equity case and the judgment in the action at law should both be affirmed.

FRANK K. NEBEKER.
Assistant Attorney General.
W. W. DYAR,
Special Assistant to the Attorney General.
JANUARY, 1920.

APPENDIX.

REGULATIONS GOVERNING USE OF VACANT CEDED INDIAN LANDS.

To Officers in Charge of Indian Reservations and Registers and Receivers of United States Land Offices.

Department of the Interior,
Washington, D. C., July 25, 1912.

Gentlemen: Regarding the question of jurisdiction over Indian lands after they have been opened for settlement and entry, under date of November 27, 1911, the First Assistant Secretary of the Interior addressed the Commissioner of Indian Affairs as follows:

JURISDICTION OVER RELINQUISHED INDIAN LANDS.

November 27, 1911.

The Commissioner of Indian Affairs.

Sir: You have submitted the question of jurisdiction over lands within Indian reservations after they have been opened to settlement and entry.

The question is perhaps not one so much of jurisdiction as one involving the rights of the Indians to the use and benefit of the lands after provision has been made extinguishing the Indian claim and making disposition of the lands. You note that such lands may be divided generally into two classes: (1) Those which the United States has purchased from the Indians and paid for, the Indian claim thereto being thus completely extinguished; and (2) those which the United States agrees to dispose of for the benefit of the Indians, without, however,

becoming bound to purchase the lands, whereby the claim of the Indians remains unextinguished until the lands are finally sold.

The department agrees with you that as to the first class the Indians have no further concern and that after the cession such lands are properly under the jurisdiction of the General Land Office.

The department also agrees with you that the Indians are rightfully entitled to the use and benefit of the lands coming within the second class until they shall have been finally disposed of, with the condition, however, that the use thereof shall in nowise interfere with the speedy sale or other disposition provided by law. There should be no difficulty in properly handling such cases through joint cooperation between your office and the General Land Office. There can be no objection to permitting the use of such lands by the Indians or for grazing purposes for the benefit of the Indians, provided always that such use is so controlled as to not interfere with the settlement or sale of the lands. You will in all such cases confer with the General Land Office, with a view of adopting such rules and regulations as may be necessary to secure to the Indians any income that may be properly derived from the lands and at the same time to secure their early sale or settlement, as the law may direct.

In respect to the Round Valley Indian Reservation in California, specifically referred to by you, the act of October 1, 1890 (26 Stat., 658), provides for the survey and allotment of the agricultural lands to the Indians in severalty, for the reservation of a reasonable amount of grazing and timber lands, and for the survey of the remainder of grazing and timber lands into tracts of 640 acres, and the sale of the same, the proceeds thereof, after paying the expenses, to be placed in the Treasury of the United States to the credit of the Indians.

The act of February 8, 1905 (33 Stat., 706), directed that all the lands relinquished from the Round Valley Indian Reservation under the act of October 1, 1890, supra, should be surveyed, reappraised, and thereafter be subject to settlement and entry under the provisions of the homestead laws of the United States, and that all the lands thus opened to settlement remaining undisposed of at the expiration of five years from the taking effect of the act might be sold and disposed of for cash, the proceeds to be disposed of as provided in the act of 1890.

Under these provisions of law this reservation clearly falls within the second class, and the Indians are entitled to possession of the lands until the same shall have been settled upon, entered, or sold. You will immediately confer with the General Land Office, with a view to entering into an arrangement along the lines suggested herein.

A copy of this letter will be sent to the Commissioner of the General Land Office for his information and guidance.

Very respectfully,

SAMUEL ADAMS,
First Assistant Secretary.

To put into effect the foregoing rulings of the department and to provide for concurrent supervision over the lands involved, wherever situated, for the protection and benefit of the Indian owners and protection of prospective settlers, the following instructions are issued:

1. Up to date of entry, sale, or settlement, the lands in class 2 shall be under the jurisdiction of the Bureau of Indian Affairs and under the immediate supervision of the officer in charge of the Indian reservation where the lands are situate.

2. The officer in charge of the Indian reservation will prepare permits for grazing purposes in favor of responsible persons on the form approved by

the department September 1, 1911 (5–175a), to which shall be added the following:

It is understood and agreed by the permittee that he will place no improvements upon the lands covered by this permit without first securing the written consent of the officer in charge of the reservation, and all fences and other improvements which he shall place upon the lands shall remain thereon at the expiration of the permit and become the absolute property of the equitable owner of the soil.

It is also understood and agreed by the permittee that from and after the date of any bona fide settlement, sale, or entry of the lands covered by this permit, or any part thereof, this permit becomes void as to the lands so affected, and the permittee agrees and hereby stipulates that he will not interfere with or in any manner attempt to prevent any person from making settlement, filing, or entry upon any of the lands included in this permit.

The penalty for violating the foregoing conditions and stipulations will be the summary revocation of the permit.

3. No permit shall be issued for a longer period than one year, and all permits shall be subject to the approval of the Secretary of the Interior.

4. Before executing a permit in favor of any person the officer in charge of the reservation will first ascertain from the land office of the district in which the lands are situated if said lands are applied for or are included in any entry of record. And thereafter, upon the execution of a permit, he will furnish the said land office with a description of the lands, the name of the permittee, and length of term, the same to be posted in the land office for the information of the public.

Any and all permits executed under these instructions shall be subject and subordinate to any valid settlement made or maintained under the public-land laws.

5. The officer in charge of the reservation is charged with the duty of preventing all trespassing on lands in class 2, the collection of trespass fees, and the prosecution of trespassers as provided by law.

6. After date of entry, sale, or settlement the lands in class 2 shall be under the jurisdiction of the General Land Office, and any permit in effect at such date shall cease and determine, and if occupied by any Indian such Indian's right of occupancy shall cease.

7. It shall be the duty of the local land officers to furnish the officer in charge of all Indian reservations within their jurisdiction monthly lists of all applications for entry or purchase, as well as all relinquishments filed, embracing lands in class 2, and to furnish also information when requested as to particularly described tracts.

Approved:

F. H. ABBOTT,
Assistant Commissioner of Indian Affairs.

Approved July 25, 1912:

S. V. PROUDFIT,
Assistant Commissioner of the General Land Office.

Approved July 25, 1912:

SAMUEL ADAMS,
First Assistant Secretary.

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

ASH SHEEP COMPANY, PLAINTIFF IN error,
v.
THE UNITED STATES OF AMERICA. } No. 285.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and respectfully moves that the above entitled cause be advanced for hearing with case No. 212 on the docket for the present term, *Ash Sheep Company, appellant,* v. *The United States of America.*

In Case No. 212 the Government sought, in August 1913, to enjoin the defendant Ash Sheep Company from grazing, without first having obtained permit therefor from the Interior Department, some 7,100 head of sheep on certain lands within the State of Montana claimed to have been reserved for the use and benefit of the Crow Indians, and to recover, under the provisions of Section 2117, Revised Statutes, damages of $1.00 per head for each of said sheep so grazed. A decree was entered dismissing

the bill of complaint. On appeal, the Circuit Court of Appeals reversed the decree and remanded the cause with instructions to grant the injunction prayed and to award such damages as the court should find the complainant entitled to. The court below granted a permanent injunction and awarded nominal damages in the sum of $1.00, besides costs. On a second appeal, the former decision of the Circuit Court of Appeals was adhered to and the decree affirmed.

Case No. 285 involves an action brought in May 1916, under the terms of said Section 2117, Revised Statutes, to recover a penalty of $1.00 per head for each of said 7,100 head of sheep grazed by the Ash Sheep Company on the lands hereinbefore mentioned. Judgment was rendered on the pleadings in favor of defendant. Upon writ of error from the Circuit Court of Appeals, the judgment below was reversed. On the trial thereafter had upon an agreed statement of facts, damages were awarded in the sum of $5,000. Upon a subsequent writ of error, the Circuit Court of Appeals affirmed the judgment below.

Both cases present the fundamental question, whether the lands over which the sheep were grazed were "public lands," upon which grazing is permitted without express license from the Interior Department, or whether they were "Indian lands," held in trust by the United States for the benefit of the Crow Indians. Case No. 285 presents the additional questions, (1) whether sheep are included within the provisions of said Section 2117, Revised Statutes, referring to "horses, mules, or cattle";

and (2) whether by reason of its former claim for damages in case No. 212, and judgment thereon, the United States is estopped to seek damages in the later suit (No. 285).

Both cases grow out of the same transaction and depend upon the same state of facts. It is impossible to decide one without disposing of the basic question involved in the other. (*Ableman* v. *Booth*, 18 How. 479.)

Opposing counsel concur in this motion.

ALEX. C. KING,
Solicitor General.

OCTOBER, 1919.